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IN the SUPREME COURT of the UNITED STATES

FULL SALVATION UNION
(a Michigan Religious Corporation) and
J. F. ANDREWS
Appellants

vs.

PORTAGE TOWNSHIP
(Kalamazoo County, Michigan,
A municipal corporation organized
and existing under and by virtue of the
laws of the State of Michigan.)
Appellee

ON APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

JURISDICTIONAL STATEMENT

In compliance with Rule 12 (1) of the Supreme Court of the United States, as amended April 6, 1942, appellants file their statement disclosing the basis upon which they contend that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 (a) of the Judicial Code or 28 U. S. C. A. 344 (a).

Under the Act of Congress of January 31, 1928, chapter 14, 45 Stat. 54, and under the Act of Congress

of April 26, 1928, chapter 440,45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. This case presents a state of facts within the jurisdiction of this Court.

Legislation Drawn in Question

The legislation, the constitutionality and validity of which is here drawn in question is the Portage Township zoning ordinance, known as Ordinance No. 1, being the only ordinance in the Township's book of ordinances.

The ordinance was adopted pursuant to the provisions of Act No. 302, Pub. Acts 1937, as amended by Act No. 69, Pub. Acts 1939, Comp. Laws Supp. 1940, section 2651-11 et seq., Stat. Ann. 1942 Cum Supp. sections 5.2962 (1)-5.2962 (12). Under said Act 302 Portage Township could not be zoned because it was not contiguous or adjacent to a city of 40,000 population and was too sparsely settled, the Act requiring 5,000 population before it could be zoned. Act 69 of Public Acts of 1939 reduced the population requirements to 1500. Portage Township had over 1500, in fact about 4,000 population in 1940, and so it could be zoned. Said Act was repealed by Act No. 184, Pub. Acts 1943 Comp. Laws Supp. 1945, section 2651-71 et seq., Stat. Ann. 1946 Cum. Supp. sections 5.2963 (1)–5.2963 (31). By specific provision of section 26 of the repealing act, however, ordinances previously adopted by townships under the Act of 1937 remained in full force and effect.

The ordinance divided the 36 square miles in the Township into 5 use districts and of the 36 sections, 33 are arbitrarily made "B"-Residential. Some 12 of these sections provide for an exception such as "C"–Local Business or "D"—Commercial and Industrial.

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The property of Full Salvation Union, Appellant herein, is located in this "B"–Residential use district.

The provisions of the ordinance most in question are:
Section 4. "B" Residence District.

In the "B" Residence District no building or premises shall be used and no building shall be hereafter erected or altered, unless provided in this ordinance, except for one or more of the following uses:

1. Any use permitted in the "A" Residence District. (These include: private and two family dwellings, churches, Public schools, Libraries and Accessory buildings.)
2. Farming and truck gardening.....
3. Multiple Dwellings
4. Hotels
5. Private clubs, fraternities, lodges.....
6. Boarding houses
7. Hospitals
8. Institutions of an educational, philanthropic or eleemosynary nature.....
9. Nursery and greenhouses
10. Accessory buildings.....
11. Public garages.....
12. Golf courses.....

Section 10. Area Requirements.

The building width of houses and other structures in "A" Residence Districts and "B" Residence Districts shall be as limited by other sections of this ordinance. Every dwelling hereafter erected shall contain not less than 400 square feet of first floor space.

Section 12. Light, Ventilation, Sanitation and Protection Requirements.

1. (omitted.)

2. Every dwelling hereafter erected shall be provided with running water, adequate inside water closet accommodations, and sewage facilities.

3, 4 and 5, (omitted).

6. Every dwelling hereafter erected shall be placed upon a substantial foundation of mortar and stone, brick, concrete or other similar or like materials; all joists shall be not less than one foot off the ground; all exterior walls shall be finished with butt wood siding, wood shingles, asbestos-cement shingles or siding, stucco on metal lath, masonry veneer or other similar standard siding materials. No roll roofing material shall be used for exterior siding purposes; all wood exterior finish shall be painted or similarly protected; all roofs shall be finished with asphalt, asbestos, or wood shingles, or other standard roofing material or materials of a permanent nature and construction; no tar paper or other similar materials shall be used as a permanent exterior roofing; all chimneys shall be of approved masonry or re-enforced concrete and shall extend at least two and one-half feet above the highest point of the roof of the building on which they are constructed and shall be wholly supported on a substantial ground foundation.

7. (omitted.)

Section 13. Tents and Automobile Trailers; other unlawful Uses.

Tents, house trailers and/or automobile trailers shall not be used for dwelling purposes within the township limit, provided, however, that house trailers or automobile trailers may be used for temporary dwelling for a total period of not more than 14 days in any one year by any one family when located upon premises having

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running water and sewage facilities, and provided further that automobile trailers and house trailers may be occupied for dwelling purposes within duly licensed house trailer camps and subject to the requirements thereupon imposed.

The keeping of pigs or hogs is prohibited in properties platted for residential purposes within the use district boundaries.

A complete copy of the above ordinance was put in evidence as Plaintiff's Exhibit E. (Record, 81).

The pertinent provisions of the ordinance are set out in Appendix D hereto.

Also drawn in question is section 8 of Act No. 302 of the Public Acts of Michigan of 1937, as amended by Act No. 69, Public Acts of Michigan 1939, under authority of which the foregoing ordinance was adopted, and providing as follows:

> "Buildings erected, altered, razed or converted, or uses carried on in violation of any provision of township ordinances or regulations made under the authority of this Act are hereby declared to be a nuisance per se. The Court shall order such nuisance abated and the owner and/or agent in charge of such building or land shall be adjudged guilty of maintaining a nuisance per se."

How Legislation Construed by Court Below

The ordinance was construed by the Michigan Supreme Court, upon affirming the decree of injunction by the Circuit Court for the County of Kalamazoo, Michigan, as not authorizing the use of the corporate appellant's, Full Salvation Union's, property, located in Section 23 of Portage Township, for camp meeting purposes, and that inasmuch as such use is not authorized by the ordinance such use is **ipso facto** made a nuisance

per se under authority of Section 8 of Act 302 of Public Acts of Michigan 1937, above cited, and subject to abatement by injunction, **irrespective of the reasonableness of the use in relation to the factual situation.**

The said ordinance and statute were also construed by said Court as authorizing the **enjoining of erection** of buildings and the use of tents suitable and appropriate to such camp meeting use, for dwelling purposes, i.e. in the summer season, because they do not comply with the building requirements of the ordinance even though such requirements reasonably apply only to year round dwellings.

The said ordinance and statute were also construed by said Court as authorizing the summary abatement as a nuisance **per se** of a church building which complies with the building requirements of the ordinance and the uses allowed by said ordinance, merely because the Township Board had arbitrarily refused to issue a formal building permit for its erection.

The said ordinance and statute were also construed by said Court as authorizing the summary abatement as nuisances **per se** of fourteen cottages or cabins suitable and appropriate to the camp meeting use for dwelling purposes, i.e. in the summer season, because they did not comply with certain requirements as to dwellings specified in the ordinance which reasonably apply only to year round dwellings and because the Township Board had arbitrarily refused to issue building permits for their erection.

The Supreme Court of Michigan, the highest court of Michigan in which a decision can be obtained in this cause, held that the ordinance and statute were valid and constitutional and that they did not abridge appellants' rights of freedom to worship and serve Almighty God according to the dictates of conscience and as com-

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manded by Him. Said Supreme Court also held that said ordinance and statute were not unconstitutional because unreasonable and in excess of the police powers of the state and township and contrary to the Fourteenth Amendment of the United States Constitution. The Court also refused to hold that the ordinance conferred arbitrary and discriminatory power on the Township Supervisor and the Township Board contrary to the Fourteenth Amendment to the United States Constitution. The court of last resort of the State of Michigan sustained the application of the ordinance and statute to appellants and decided in favor of the validity of same under the United States Constitution and held that they were constitutional on their face and as construed and applied.

Michigan Supreme Court is Court of Last Resort

Appellants were enjoined by decree of the Circuit Court for the County of Kalamazoo which was affirmed on appeal by the Supreme Court of Michigan which by the Constitution and statutes of Michigan is the highest Court of appeals in the State of Michigan and the Court of last resort in which a decision could be had in this cause.

Timeliness

The opinion and decree of the Supreme Court of the State of Michigan affirming the decree of the Circuit Court for Kalamazoo County, Michigan, was rendered and filed October 13, 1947, as a final decree.

This petition for appeal is duly presented and filed within three months from the date such decree became final and is therefore timely as required by law.

Opinion

The opinion of the Supreme Court of the State of

Michigan, the court of last resort in said state is reported in 29 N. W. (2nd) 297, Oct. 13, 1947, and is attached hereto as Appendix A. The decree of the Circuit Court for Kalamazoo County, Michigan, is attached hereto as Appendix B. The opinion of the Circuit Court for Kalamazoo County, Michigan, is attached hereto as Appendix C.

Statement of Nature of Case, Rulings of Courts and Manner in which Federal Questions Were Raised.

The Appellant, Full Salvation Union, is a religious organization incorporated in the State of Michigan Jan. 31, 1934, for the purpose of carrying on religious, educational and charitable work. It has numerous churches, chapels, tabernacles, and missions throughout Michigan and some in other states. The Appellant, J. F. Andrews, is the General Pastor and principal executive officer of the denomination.

Since its formation an annual camp meeting has been held for a period of approximately two weeks each summer. In connection therewith the denomination also has conducted a Bible School and held its General Council Meeting of the entire membership and the Annual Meeting of its Elders, its general executive body.

The Appellee, Portage Township, is a wholly rural area of thirty-six (36) square miles located a few miles south of the City of Kalamazoo. On February 8, 1942, Portage Township adopted the zoning ordinance, hereinabove described under the heading "Legislation Drawn in Question."

On May 4, 1942, the Appellant denomination purchased a rectangular tract of about 15 acres of land wholly covered by a thick growth of timber for a permanent Camp Meeting, Bible School and Conference

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Grounds; a little less than three months after the Portage Township Zoning Ordinance had been enacted. This tract of land is located 7 miles south of the City of Kalamazoo and about ¼ mile from the northerly end of West Lake in Portage Township.

Immediately after the purchase of the land the appellant denomination applied for and obtained a building permit for a large tabernacle to be used each summer as the central meeting place and a permit for a cottage to be used by the caretaker of the grounds. The appellant denomination notified the Township Supervisor of the intended use of said wooded land and requested that it be exempted from taxes. The exemption was granted.

The tabernacle and caretaker's cottage were completed in the summer of 1942 and the Camp Meeting and Bible School, the General Council Meeting and the Annual Meeting of the Elders were held during a period of about two weeks. A number of cottages or cabins were erected or placed on the grounds by individual members of the Full Salvation Union to be used by them as temporary dwellings during the meetings. Some tents and house trailers were used for the same purpose. During the conference and camp meeting period, the Full Salvation Union provided members with meals and religious literature at cost or below cost as an accommodation to the members.

Similar meetings have been held each summer since 1942, to and including 1947.

Other members placed cottages or cabins on the grounds in 1943, making in all, fourteen cottages or cabins erected without building permits.

In November, 1943, following the meeting in July the Portage Township Board by letter notified Reverend J. F. Andrews, Appellant herein, that the cottages or

cabins erected by the members did not comply with the requirements of the zoning ordinance and that no permits had been issued for them. This letter was the first notice of any difficulty with the zoning ordinance and immediately Reverend J. F. Andrews made efforts to get permits issued for these buildings and when told that they did not comply with the requirements for dwellings, he requested that they be recognized as "accessory buildings" within the meaning and intent of the ordinance. At the same time a request was made for a building permit for a garage for the caretaker's cottage. The action of the Board was to withhold such permit for the garage until the cottages and cabins were made to comply with the ordinance.

At a Board meeting two weeks later, the Board agreed to accept the cottages or cabins as accessory buildings and asked the township attorney to prepare a suitable permit for these buildings p. 304-305 (Record) and granted a permit for the garage p. 87-88 (Record).

In the spring of 1944, a request was made for a building permit for a church building to be used for year round religious services for the community. The action of the Board was to lay the request on the table until the garage was completed. The garage was completed and the church building was partly constructed including modern toilet facilities and large septic tank but the Board then refused to issue the formal permit for the church building, so that it has not been completed since the permit has not been issued.

Reverend J. F. Andrews and other representatives of Full Salvation Union negotiated with Portage Township Board, attended Board meetings, tried to reach some agreement whereby the Appellant, Full Salvation Union, could continue to make use of its camp meeting grounds

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and submitted plans for the operation and development of the grounds.

At a later meeting, the Board refused to treat the cottages or cabins as accessory buildings and refused to rezone the land in question.

The land involved in this case is a tract of approximately fifteen (15) acres of wooded land located in Portage Township about seven (7) miles from the City of Kalamazoo; one-fourth (¼) mile from West Lake; used for hunting and dumping rubbish until Full Salvation Union purchased it. Portage Township is a wholly rural area and contains no populous areas. This land was owned for nineteen (19) years by a realtor who testified that he was unable to sell any portion of it for residential purposes. This land is surrounded on all four sides by large tracts of farm and vacant land and only one house is within two hundred (200) feet of any buildings on the land of Full Salvation Union.

On June 22, 1944, Portage Township instituted suit to enjoin Appellants herein "from erecting, maintaining or using of any tents, cabins and/or other structures for camping and/or temporary dwelling purposes, or suffering or permitting the use of premises controlled by them located in Portage Township, Kalamazoo County, Michigan, for camping and/or temporary dwelling purposes and in any manner whatsoever in violation of the terms and provisions of the Portage Township Zoning Ordinance" and further praying that the Court "determine that all buildings, structures and tents placed on said premises in violation of the terms of the Portage Township Zoning Ordinance and without permits therefor, be declared to be nuisances per se and that said defendants (Appellants herein), and/or their agents in charge, be ordered to forthwith abate said nuisances."

After the trial of the case, the Circuit Court for Kalamazoo County, Michigan, issued an injunction decree which is attached hereto as Appendix B and gave an opinion which is attached hereto as Appendix C.

The Circuit Court enjoined Appellants from using the tract of land as a Camp Meeting ground on the basis of a nuisance in fact although the Bill of Complaint did not pray for an injunction on any such ground and there is no evidence in the record to support a finding of nuisance in fact. This trial court also enjoined the erecting of tents, cabins or cottages or other temporary structures not in compliance with the ordinance as nuisances per se, and ordered those already erected to be abated in 30 days, irrespective of the factual situation and without citing any authority for the order in its opinion.

On appeal the Supreme Court of Michigan affirmed the injunctive decree on Oct. 13, 1947, in an opinion hereto attached as Appendix A.

While the individuals who erected or placed the 14 cabins or cottages on the Camp Meeting grounds without permits have removed them subsequent to the decree of the Michigan Supreme Court on Octobr 13, 1947, yet the validity of the injunction decree is still in issue inasmuch as (1) it forbids absolutely a Camp Meeting use of the property of Full Salvation Union, Appellant herein, (2) it restrains Appellants "from erecting, maintaining or using or suffering or permitting the use thereof of any tents, cabins or other structures for camping and/or temporary dwelling purposes, or in any other manner whatsoever in violation of the terms and provisions of the Portage Township Zoning Ordinance", and (3) it declares the church building partially erected on the premises under informal permission, a nuisance

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per se and subject to abatement since the Portage Township Board subsequently refused to issue a formal permit; therefore the injunction deprives said Appellants of freedom of religious worship and deprives Full Salvation Union of its property and denies Appellants equal protection of the laws, contrary to Amendments I and XIV of the U. S. Constitution.

The Supreme Court of Michigan tacitly admits that there are no facts in the record on which to base the injunction on ground of a nuisance in fact, because that Court in its opinion (Appendix A) after noting that the injunction was granted on the ground of nuisance wholly **ignores and abandons that theory of the case** and proceeds to develop a different theory of the case to support the injunctive decree.

The Michigan Supreme Court's Theory of the Case

The theory of the Michigan Supreme Court as to validity of the injunction decree is based on three primary propositions insofar as material to this appeal;

FIRST: That the ordinance does not authorize the camp meeting use.

That the ordinance does not authorize the use.

Whether this is the proper construction of the ordinance is not open to discussion in the U. S. Supreme Court (although it was controverted in the state courts) since the meaning attributed by the highest court of a state to a statute of the state must be accepted by the U. S. Supreme Court, on review, as though it had been specifically expressed in the statute. Supreme Lodge Etc. v. Meyer 265 U. S. 30 (1924). An ordinance is a statute within the meaning of section 273 (a) of the

Judicial Code and 28 U. S. C. A. 344 (a), John P. King Mfg. Co. v. City Council of Augusta 277 U. S. 267 (1928). Jamison v. State of Texas 318 U. S. 413 (1943).

Though the Michigan Supreme Court generalizes the single incident alleged by one witness for the Township, who admitted she had never been on the Camp ground herself (Record, p. 108, 117), that "noise continued from early in the morning until approximately 4:00 A. M. the following day," which was disproved by two witnesses for Appellants who were on the grounds constantly and in general charge of the religious services (Record, p. 115, 309), yet the incident is not cited by the court as evidence of a nuisance in fact but to the effect that: "It cannot be said that such use was within the contemplation of the ordinance" and as evidence to bolster the Court's statement earlier in its opinion that: "It is obvious also that the Camp Meeting itself was an unauthorized use of the premises on which it was conducted."

But an ordinance cannot exclude a lawful use merely because it does not authorize it. The proposition is fallacious in that it assumes that the ordinance covers the whole field of possible lawful uses and that unless a particular use is expressly authorized it is **ipso facto** forbidden. This is not the law.

Whether a Camp Meeting use is a lawful use of property under the 14th Amendment of the U. S. Constitution depends upon whether the use is a reasonable one under the facts and circumstances of the case. Nectow v. City of Cambridge 277 U. S. 183 reversing 260 Mass. 441 (1928). Seattle Trust Co. v. Roberge 278 U. S. 116 (1928).

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SECOND: The Ordinance is Valid.

The Supreme Court of Michigan asserts the ordinance is valid because (a) the presumption is that it is valid and (b) that it is reasonable because it is not "unrelated to the public health and welfare. The requirements as to water, light and sanitation, above noted [presumably the requirements of the ordinance as to year round dwellings outlined in first part of the opinion] clearly were incorporated to serve proper purposes well within the scope of the police power. It cannot be said that they do not reasonably serve such purposes."

It is not the universally recognized rule as the Michigan Court seems to assume that the presumption is in favor of the validity of a zoning ordinance and the acts of public officials thereunder. The Supreme Court of Ohio in State, etc. v. Joseph 139 Oh. St. 229, 39 N. E. (2nd) 515, 523, in an analogous case, states:

"In determining whether respondents' administrative acts and policies may be upheld, it should be observed that the usual presumption of the validity of the Acts of Public Boards and officials does not apply to acts involving the forfeiture of an individual's rights or the depriving him of the free use of his property. 22 Corpus Juric, 141; Deaver v. Napier 139 Minn. 219, 166 N. W. 187; Christ v. Fent 16 Okl. 375, 84 p. 1074. Applying this exception to a case like the one at bar, where public officials seek under a zoning ordinance to deny a landowner a particular use of his property, the highest court of Maryland has held that the board of zoning appeals has the burden of showing reasons sufficient to support its authority in refusing a building permit.

Applestein v. Mayor and City Council of Baltimore, 156 Md. 40, 47, 143 A. 666."

Even though it be true that the law presumes that an ordinance is valid yet it is only a presumption not a conclusive rule. The presumption can be rebutted by competent evidence.

Appellants in attacking the validity of the ordinance may have had the burden of proof but when competent evidence had been presented rebutting the presumption, then the Township had the burden of showing that facts exist to justify the application of the ordinance to Appellants.

Appellants by an overwhelming array of facts rebutted the presumption as to validity of the ordinance by showing its unreasonableness in its application to (a) the Camp Meeting use which is a lawful use and (b) the buildings erected or placed on the property being used only seasonally, should not be required to comply with requirements for dwellings for year round occupancy.

The Michigan Supreme Court completely ignores these facts and does not even assert that Appellants failed to produce facts which would rebut the presumption.

In this state of the case, the burden was shifted to the Township to show facts supporting the reasonableness of the ordinance. The Township wholly failed to produce any evidence that would support the validity of the ordinance by negating the facts produced by Appellants or by introducing new facts.

Appellants' evidence is undisputed and shows the ordinance to be invalid as an abridgement of religious freedom and an unreasonable deprivation of property

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contrary to Ammendments I and XIV of the United States Constitution insofar as it

(1) forbids the use of the property for a Camp Meeting, Bible School and Conference Ground for Appellant, Full Salvation Union;

(2) requires dwellings suitable for year round use when temporary dwellings are more reasonably suited for the particular use;

(3) requires removal of a partially constructed church building because the Township Board arbitrarily refused a building permit.

THIRD: The Camp Meeting, Bible School and Conference use and the temporary dwellings, being forbidden by the ordinance, are nuisances per se under the statute [Section 8 of Act 302 of the Public Acts of 1937 of Michigan] and subject to abatement by injunction.

The theory of statutory nuisance **per se** as applied by the Michigan Supreme Court contains 2 elements:

(A) The Camp Meeting use is a nuisance **per se.**

(B) Variations from the building requirements, make the temporary dwellings nuisances **per se.**

And both are held to be nuisances without further showing because the statute declares them to be such **per se.**

The decision is that: If a statute by definition declares a use or a thing a nuisance, it thereby is a nuisance, **irrespective of the factual situation.**

The decision goes further: A Camp Meeting use is not defined as a nuisance other than by implication, in that it is not expressly authorized as a use, and therefore by implication is forbidden, and as such is therefore a

nuisance **per se** and subject to abatement by injunction.

No court it is submitted has ever gone so far.

It has been the consistently recognized law under the 14th Amendment to the U. S. Constitution since and perhaps earlier than Lawton v. Steele 152 U. S. 133 (1894) that the legislature cannot by mere definition make something a nuisance irrespective of the factual situation.

In that case this Court declared (p. 137) "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unnecessary and unusual restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

While the Michigan statute provides for abatement by injunction by a court, yet the Michigan Supreme Court's theory is that the legislative declaration makes unnecessary any inquiry by the court as to the facts of the situation.

A. A Camp Meeting use as a nuisance **per se.**

The cases cited by the Michigan Supreme Court as showing the authority of the legislature to declare nuisances **per se** include:

(1) A place for selling **intoxicating liquors** in express violation of the law, citing

Mugler vs. Kansas 123 U. S. 623.

Denapolis vs. U. S. 3 Fed. (2nd) 722.

State ex rel. Threlkeld vs. Osborne 207 Ia. 636, 223 N. W. 363.

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Stead vs. Fortner 225 Ill. 468, 99 N. E. 680.

(2) A place for **gambling** in express violation of law, citing

Pompano Horse Club vs. Florida 93 Fla. 415, 111 So. 801.

State ex rel. Hunter vs. The Araho 137 Neb. 389, 289 N. W. 545.

(3) A house of **ill fame,** citing

State vs. Ellis 201 Ala. 295, 78 So. 71.

(4) Operation of a **motion picture house on Sunday** in violation of law, citing

Farehand Sol. Gen'l. vs. Moody 200 Ga. 166, 36 S. E. (2nd) 321.

(5) **Collection of garbage** by persons not licensed in express violation of an ordinance, citing

City of Grand Rapids vs. Vink 184 Mich. 688, 151 N. W. 672.

It is urged that the Michigan Supreme Court has misconstrued ***Mugler vs. Kansas****, supra, in the light of* ***Lawton vs. Steele,*** *supra, as to the authority of the legislature to declare a nuisance per se.*

The above cited cases involve uses or practices recognized by law and community mores as nuisances and it is competent for the legislature by statute to declare them to be nuisances **per se** and authorize their abatement by injunction.

But a camp meeting use is obviously not comparable to any of these. A number of states including Michi-

gan have enacted statutes to specifically authorize camp meetings of which the following are illustrative:

Compiled Laws Michigan 1929, Sections 10327-10348.

Religious Corporations Law of New York, Sections 20, 21, 21a and 225-N (5).

Revised Stat. New Jersey 1937, Title 40, ch. 95 to 102.

Burns, Indiana Stat. Anno. 1933, ch. 23., Sec. 25-2301-7.

And many states have enacted statutes specifically to protect camp meetings, the following being illustrative:

General Laws Massachusetts 1932, ch. 272, Sec. 39, p. 3186.

General Statutes of Connecticut, Revision 1930, Sec. 3560-1.

Illinois Revised Stat. 1947, State Bar Assn. Ed., ch. 38, Sec. 176.

Purdons Penna. Stat. 1936, Tit. 15, Sec. 3241-47; Tit. 73, Sec. 131-133.

Not only is a camp meeting use lawful generally but Appellants' uncontradicted evidence shows the use to be reasonable and lawful under the 14th Amendment to the U. S. Constitution, in the place, in the spot, where carried on.

B. Building Requirements—violations as nuisances **per se.**

That violations of building requirements in an ordi-

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nance may be declared a nuisance **per se** and abated by injunction has been held in

People vs. Kelly 295 Mich. 632, 295 N. W. 341

and such violations may be abated by injunction when so authorized in the ordinance, tho not declared nuisances **per se**, has been held in

City of Detroit vs. Kunin 181 Mich. 604, 148 N. W. 207

and such violations, though not declared a nuisance **per se**, may yet be abated by injunction, has been held in

City of Stockton v. Frisbie and Latta 93 Calif. App. 277, 270 Pac. 270

as cited by the Michigan Supreme Court, but none of these cases is applicable to the Appellants' case.

In the above cases there is no problem as to the reasonableness of the building requirement in relation to the use involved. In Appellants' case the question is as to the reasonableness of the requirements as to inside plumbing, foundations, chimneys etc., for dwellings for year round use when applied to temporary dwellings for a two weeks' period in the summer.

The Township has insisted on the requirements for year round dwellings as to running water, inside plumbing, sewage facilities, foundations, etc., which are clearly unreasonable when applied to the habitations suitable and appropriate for the Camp Meeting use only in the summer season.

It is submitted that the Michigan Supreme Court is in error in holding that the habitations suitable and appropriate for the Camp Meeting use, to-wit: tents,

cabins, cottages, house trailers etc., are statutory nuisances **per se**, irrespective of the factual situation.

The rights of Appellants under the U. S. Constitution were raised in the answer of Appellants to the Bill of Complaint and were fully argued in briefs and oraly before the Circuit Court for Kalamazoo County, Michigan, and upon general appael to the Michigan Supreme Court were fully presented to the Michigan Supreme Court by the answer of Appellants and were fully argued in briefs and orally by counsel before that Court, as appears from the opinion of the Michigan Supreme Court which states:

"This brings us to a consideration of the principal question in the case, the validity of the zoning ordinance. Defendants claim that as construed by the township officials and by the trial court it is not a proper exercise of the police power of the State because 'unreasonable, arbitrary and discriminatory'. Defendants further assert, as appears from their answer, that said ordinance operates to deprive them of property without due process of law in violation of the Constitution of the United States, 14th Amend. Sec. 1, and the Michigan Constitution 1908, Art. 2, Sec. 16."

The unreasonable abridgement of Appellants' rights to freedom of religious worship under the U. S. Constitution was also raised by Appellants in their answer and is the primary question in this case and was fully argued in briefs and orally by counsel before the said Circuit Court and the Michigan Supreme Court, although not noted by the Michigan Supreme Court in its opinion.

Grounds and Decisions Sustaining Appellate Jurisdiction of the Supreme Court of the United States and Showing Federal Questions Involved On Appeal.

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ONE

The ordinance and the statute under which the ordinance was adopted and is enforced, as they have been construed and applied by the Court below, as absolutely-forbidding a Camp Meeting use by Appellants in Portage Township, Michigan, constitute an unreasonable abridgement of Appellants' rights to freedom of religious worship contrary to Amendments I and XIV of the U. S. Constitution.

Largent v. State of Texas 318 U. S. 418 (1943)

Cantwell v. Connecticut 310 U. S. 296 (1940)

Schneider v. State of New Jersey 308 U. S. 147 (1939).

Martin v. City of Struthers, Ohio 319 U. S. 141 (1943).

TWO

The ordinance and the statute under which the ordinance was adopted and is enforced, as they have been construed and applied by the Court below, as absolutely forbidding a Camp Meeting use by Full Salvation Union, Appellant herein, of its property in Portage Township, Michigan, is an arbitrary and unreasonable deprivation of property rights of said Appellant without due process of law contrary to Amendment XIV of the U. S. Constitution.

Nectow v. City of Cambridge 277 U. S. 183 (1928)

Seattle Trust Co. v. Roberge 278 U. S. 116 (1928)

and states courts have likewise so held in analogous cases:

State ex rel. Roman Catholic Bishop of Reno v. Hill City Engineer. 59 Nev. 231, 90 Pac. (2nd) 217 (1939)

State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph 139 Oh. St. 229, 39 N. E. (2nd) 515 (1942)

Ellsworth, Building Inspector v. Gercke 62 Ariz. 198, 156 Pac. (2nd) 242 (1945).

THREE

The ordinance and the statute under which the ordinance was adopted and is enforced, as they have been construed and applied by the Court below, as constituting the Camp Meeting use and temporary dwellings suitable and appropriate to such use, such as tents, cabins, cottages, housetrailers and automobile trailers, nuisances **per se** and subject to abatement by injunction irrespective of the factual situation, is an unreasonable abridgement of Appellants' rights to freedom of religious worship contrary to Amendments I and XIV of the U. S. Constitution.

Lovell v. City of Griffin 303 U. S. 444 (1938)

Near v. State of Minnesota ex. rel. Olson, Co. Atty. 283 U. S. 697, (1931).

Smith v. State of Texas 233 U. S. 630 (1914).

FOUR

The ordinance and the statute under which the ordinance was adopted and is enforced, as they have been construed and applied by the Court below, as constituting the Camp Meeting use and temporary dwellings suitable and appropriate to such use, such as tents, cabins, cottages, house trailers, and automobile trailers, nuisances **per se** and subject to abatement by injunction irrespective of the factual situation, is an unreasonable and arbitrary deprivation of property rights of Full Sal-

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vation Union, Appellant herein, contrary to Amendment XIV of the U. S. Constitution.

Lawton v. Steele 152 U. S. 133 (1894)

Smith v. State of Texas 233 U. S. 630 (1914)

FIVE

The ordinance and the statute under which the ordinance was adopted and is enforced, as they have been construed and applied by the Court below, are void upon their face because by their terms they are in excess of the police power of the state of Michigan and Township of Portage in that they constitute the church building partially erected by Full Salvation Union, Appellant herein, under an informal permit, a nuisance per se and subject to abatement by injunction, solely because a formal permit was subsequently refused by the Portage Township Board, whereby said Appellant is deprived of its property without due process of law and denied equal protection of the law, contrary to Amendment XIV of the U. S. Constitution.

Seattle Trust Co. v. Roberge 278 U. S. 116 (1928)

State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph 139 Oh. St. 229, 39 N. E. (2nd) 515 (1942).

SIX

The ordinance and the statute under which the ordinance was adopted and is enforced, as they have been construed and applied by the Court below, are void upon their face because by their terms they are in excess of the police power of the State of Michigan and the Township of Portage, in that they confer arbitrary and discriminatory powers upon the Portage Township Board and the Portage Township Supervisor to grant or

refuse building permits under the ordinance, whereby the Full Salvation Union, Appellant herein, has been deprived of its property without due process of law and denied the equal protection of the laws contrary to Amendment XIV of the U. S. Constitution.

Discussion

The celebrated case of Village of Euclid v. Ambler Realty Co. 272 U. S. 365 (1926) laid down the cardinal principle that zoning ordinances

> "must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities."

The Ohio Supreme Court gave careful consideration to that case in State ex rel. Synod of Ohio of United Lutheran Church of America v. Joseph, **supra,** and at p. 521 of 39 N. E. (2nd) stated:

> "It is true that the comprehensive zoning ordinance upheld in Village of Euclid v. Ambler Realty Co. . . ., which may be regarded as the cornerstone of the modern law of use zoning, did exclude churches from both single and two-family residential districts. The Supreme Court of the United States however, not only pointed out that it was simply validating the ordinance in its 'general scope' and not in detail, but, in addition, the court expressly re-

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moved from consideration that portion of the ordinance which restricted the use of property for church purposes saying at page 385 of 272 U. S. '. . . . There is nothing in the record to suggest that any damage results from the presence in the ordinance of those restrictions relating to ***churches***, schools, libraries, and other public and semi-public buildings . . . For present purposes the provisions of the ordinance in respect of these uses may therefore be put aside as unnecessary to be considered. (*italics* ours). The Village of Euclid case, while deciding that commercial and industrial structures may, consistently with the Fourteenth Amendment, be excluded from residential districts, decides nothing with regard to the exclusion of humanitarian, public and semi-public uses like churches, schools and libraries."

The case of Appellant's as shown by the facts in the Record seems clearly within the foregoing principles. The health, safety, morals and general welfare of the district where the property is located have been advanced by the use to which Appellants are putting the land. The 15 acres of wooded land used for the past 5 summers as a Camp Meeting ground had been lying idle. Thick underbrush covered the entire area, neighbors had used it as a dumping ground for tin cans and rubbish (Record, p. 66); farmers and others in the area, including one member of the Township Board, used it as a hunting ground (Record, p. 318). Appellants have spent time and money in clearing up the grounds and developing them for a permanent Camp Meeting and Conference Grounds. This land is ideal for a Camp Meeting Ground. To put it to such use advances public health, safety, morals and general welfare more than allowing it to revert to a hunting ground where the noise of guns and

barking of dogs may be heard in the hunting season instead of the sound of singing and praying for two weeks out of the year during the Camp Meeting.

The meetings of Full Salvation Union, Appellant herein, on its camp ground have been attended by a minimum of 50 or so persons and by a maximum of 500 or so persons, many of whom have not "camped" on the grounds. The maximum number of "campers" has not exceeded 300 persons.

Religious meetings such as are conducted on the Camp Ground are a blessing to any community and promote the public morals and welfare. Such noise as is made is not that of commercial or industrial enterprises, but such as is necessarily incident to the worship of Almighty God. It is impossible to pray and sing and preach the Gospel without making some noise. But the noise thus made cannot be said to compare unfavorably with that made at the carnivals, circuses and ball games every summer in the cities throughout the country. The testimony shows that the Camp Meetings are conducted in an orderly fashion and that the services each night are usually over by 11:00 p. m. (Record, p. 309).

The Township's own witness testified that only four dwellings had been erected in the vicinity during the past seventeen years (Record, p. 116). At that rate it will take over 500 years to fill up the vacant lots around and near West Lake, to say nothing of the hundreds of acres of farming and vacant land surrounding Appellant's land.

The uncontradicted evidence is that no traffic or safety hazard has existed at any time in the area. The health officer of the Michigan State Department of Health for the City and County of Kalamazoo testified

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that he had inspected the camp ground and found all requirements of the State Health Department fully satisfied and recommended only the use of covered garbage cans which has been followed (Record p. 25-34; Exhibit 1, p. 325). He also testified that the water supply after analysis "shows no contamination and since the location and construction were satisfactory this department would consider the supply satisfactory for drinking and domestic use." Record, 26, and Exhibit 2, p. 327.

Such Camp Meeting use in the locale where conducted clearly is not unlawful under Amendment XIV of the U. S. Constitution even though not authorized by the Portage Township Zoning Ordinance.

The main building called the "tabernacle" where the religious services are held is not located on a city lot in a congested residential area, but in a tract of 15 acres of woods, not subdivided, and around this central meeting place the tents, cabins and cottages were and are to be located. Central modern water and toilet facilities, complying with all requirements of the State Department of Health, are provided as is done in many tourist camps scattered throughout the country (Record, p. 28). It is unreasonable of the Township Board to demand that each individual cottage or cabin have running water and inside toilets.—This is not required of tourist camps, even when located in cities.

To maintain that the same requirements as to foundations and chimneys apply to the cabins on the Camp Ground as apply to year round dwellings located on platted lots is unreasonable. No such requirement is ever made concerning tourist cabins located in tourist camps scattered over the country and often located in large cities.

To absolutely prohibit the use of tents for overnight sleeping purposes in a fifteen acre tract of woods and in connection with Appellant's camp meeting use, is unreasonable. To demand that each cabin or cottage have inside toilet, running water, and 400 square feet of floor space is unreasonable when it is intended that it be used only as sleeping quarters during the camp meeting and when central modern toilets and running water facilities are provided for such cabins. The ordinance provides that house trailers may be used for fourteen days by any one family when located on premises having running water and sewage facilities (Ordinance, Sec. 13). These house trailers are not required to have inside toilets and running water or 400 square feet of floor space or foundations and chimneys in order to be used as **temporary dwellings.** It is unreasonable to permit the use of house trailers and prohibit an analogous use of cabins since there could be no difference as used on Appellant's camp ground in their relation to health, safety, morals or general welfare.

A central dining hall is provided on the grounds and makes the use of cooking facilities in the individual cabins unnecessary. For Full Salvation Union to feed and accommodate the people who attend the Camp Meeting at or below cost greatly enhances the adequacy of the cabins and cottages as temporary dwellings.

Nuisances per se are not made such by fiat under Amendment XIV of the U. S. Constitution, but by facts. Neither the Camp Meeting use nor the temporary dwellings used in connection therewith by the facts can be said to be nuisances, even though not authorized by the Portage Township Zoning Ordinance.

Sec. 13 of the ordinance provides: "Tents, house

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trailers and/or automobile trailers shall not be used for dwelling purposes within the township limits, provided, however, that house trailers or automobile trailers may be used for temporary dwelling for a total period of not more than 14 days in any one year by any one family when located upon premises having running water and sewage facilities ...."

This absolute prohibition of the use of tents, making no distinction between use for temporary and permanent dwelling purposes is arbitrary, capricious and unreasonable when applied to Full Salvation Union's (Appellant herein) camp meeting use of its camp ground.

The refusal of the Township Board and the Courts below to recognize the applicability of the provision in said Sec. 13 of the ordinance permitting use of "house trailers or automobile trailers. . .for temporary dwelling for a total period of not more than 14 days in any one year by any one family when located upon premises having running water and sewage facilities" to the camp meeting use of said Appellant's camp meeting ground was arbitrary, capricious and unreasonable and deprived said Appellant of its property without due process of law and denies said Appellant equal protection of the law contrary to Amendment XIV of the U. S. Constitution.

The refusal of the Township Board to issue a building permit for the construction of the church building on the property of Full Salvation Union and the enjoining by the Courts below of the construction of such church solely because such permit was not issued and ordering its removal, was arbitrary, capricious and unreasonable.

Such assertions of authority abridge the freedom of

religious worship of Appellants and deprive Full Salvation Union of its property without due process of law and deny said Appellant equal protection of the law, contrary to Amendments I and XIV of the U. S. Constitution.

Each and every assignment of error contained in the Petition for Appeal filed in this cause is here incorporated by reference to show that substantial federal questions are raised.

The opinion of the Circuit Court judge (Appendix C hereto) should not be permitted to prejudice the case of Appellants. It must be noted that the Michigan Supreme Court wholly ignored it and apparently placed no reliance upon it whatever. Not one citation of authority for applicable legal principle or precedent is made and not one particular factual reference is made to the evidence. The opinion does not appear to be based on facts but upon supposition and imagination.

The record shows that not more than four or five hundred persons have attended the Camp Meeting at any one time (Record, p. 192, 206). Sanitation and water supply were found satisfactory by Michigan Department of Health (Record, p. 25-34) and facilities were being provided as rapidly as they could be acquired under war time conditions and as they were needed.

Like any other religious enterprise, it would be natural to hope for increase in numbers but there was no evidence that there would be any unprecidented growth beyond the ability to provide facilities.

There was no evidence of any traffic congestion or hazard whatever. Testimony of a disinterested witness denied any traffic problem (Record, p. 175). No prop-

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erty owner testified that the Camp Meeting use was detrimental to the value of his property.

The opinion refers to a "restaurant and retail store" as a purpose of Appellants. The only evidence for this reference is the endeavor of Appellants to provide meals or provisions for those who attended the Camp Meeting and Conference for the period of two weeks or so at a price without profit. The ordinary church supper is aimed to secure more than cost; here no profit was made, merely a service rendered.

The opinion attacks the character of Marion and James Andrews. There is nothing to warrant such attack. Counsel for the Township spent much time and effort in attempting to find some fault with the Church organization and made insinuations concerning the leaders of the Church but failed to produce any evidence of fault.

The opinion overlooks the facts and accuses Appellants of insidious dealings with and machinations against the Township Board. The record shows that before purchasing the land in question, representatives of Full Salvation Union consulted with the legal representative of the Township Board and explained in detail the use to which the land was to be put. (Record p. 151). Marion Andrews applied for and was given permits for construction of the tabernacle and the caretaker's cottage and the Township Supervisor exempted the tract of woods from taxes (Record, p. 47-49, 152). The Supervisor testified that he inspected the premises in 1942 and watched the development of the Camp Grounds from the start (Record, p. 120). Not until after Appellants had held two Camp Meetings did the Township Board make any complaint and that was only about the cabins or cottages erected or placed on the grounds by individ-

ual members without permits. (Record, p. 226-7).

As soon as Appellants were notified that permits were required for these structures they sought to obtain such permits (Record, p. 230). They were refused (Record, p. 233). Long and patient effort was made to make satisfactory arrangements with the Township Board. James Andrews visited various members of the Board in their homes (Record, p. 237-239) and his efforts were successful to the point that the Board agreed to recognize the cabins or cottages as "accessory buildings" to the tabernacle and authorized the Board's Attorney to work out a permit satisfactory to the Board and Appellants (Record, p. 304-305). At a later meeting such permits were refused (Record, p. 305). Representatives of Full Salvation Union met with the Board again and again and submitted plans for the development of the Camp Ground (Record, p. 66-67). Such a course of conduct disproves the assertion that "There has been at no time a good faith effort on their part to comply with the ordinance." On the contrary it shows that Appellants have been frank, open and aboveboard in their dealings with the Township Board in an effort to preserve and maintain their Constitutional rights to religious freedom and the reasonable use of property in its exercise.

Wherefore, the Supreme Court of the United States should note jurisdiction of this cause for final hearing in accordance with the rules of the court, because the court below disposed of important and substantial federal questions in a way that is in conflict with applicable decisions of this Court, and has so radically and far departed from the Constitution of the United States and the accepted sound course of judicial procedure as to

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call for this Court's power of supervision and review to halt the same.

Respectfully submitted,

Full Salvation Union
By J. F. ANDREWS
J. F. Andrews, General Pastor
and principal executive officer.

J. F. ANDREWS
J. F. Andrews
Petitioners—Appellants

Address of Appellants:
114 W. Clay St.,
Kalamazoo 14, Mich.

APPENDIX A

OPINION OF THE MICHIGAN SUREME COURT

PORTAGE TOWNSHIP

vs.

FULL SALVATION UNION et. al.

Before The Entire Bench.

CARR, C. J.

Plaintiff in this case brought suit for injunction on June 22, 1944, seeking to restrain the use of certain premises in violation of the township zoning ordinance. The defendant Full Salvation Union, an ecclesiastical corporation formed under the laws of the State of Michigan, is the owner of the premises in queston, and defendant Andrews is in charge thereof as the agent of the corporate defendant. Defendants, by answer to the bill of complaint, raised issues involving the interpretation of the ordinance, its validity as construed by the officers of the township, the right of the plaintiff to seek equitable relief, and other matters not of controlling importance. Following trial in circuit court, a decree was entered for plaintiff in accordance with the prayer of the bill of complaint, and defendants have appealed.

The ordinance in question went into effect on January 16, 1942. It was adopted pursuant to the provisions of Act No. 302, Pub. Acts 1937, as amended by Act No. 69, Pub. Acts 1939 (Comp. Laws Supp. 1940, Sec. 2651-11 et seq. [Stat. Ann. 1942 Cum Supp. Sec.

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5.2962 (1)-5.2962 (12)]). Said act was repealed by Act No. 184, Pub. Acts 1943 (Comp. Laws Supp. 1945, Sec. 2651-71 et seq. [Stat. Ann. 1946 Cum Supp. Secs. 5.2963 (1) - 5.2963 (31)]). By specific provision of section 26 of the repealing act, however, ordinances previously adopted by townships under the act of 1937 remained in full force and effect subject to the adoption of a new ordinance relating to the subject matter.

The general purpose of the act under which plaintiff's zoning ordinance was adopted was indicated by the title which read as follows:

> "An act to provide for the establishment in certain organized townships of districts or zones lying wholly outside of the corporate limits of cities and villages, within which districts or zones the use of land, natural resources and structures, the height, the area, the size and location of buildings may be regulated by ordinance, and within which districts regulations may be established for the light, ventilation, sanitation and protection of such buildings, and within which districts the density of population may be regulated by ordinance; to provide for the administering of this act, and for a planning board; to provide penalties for violation; to provide against conflict with State housing code or other acts, ordinances or regulations; to provide for the collection of building permit fees in benefited districts and of taxes therefor; to provide for petition, public hearing and a referendum by the electors."

The ordinance in question divides the township into five so-called "use districts," designated as "A" residence district; "B" residence district; "C" local business district; "D" commercial and industrial district; "E"

industrial district. The premises involved in the instant case are located wholly in districts "A" and "B". The ordinance permits buildings in district "A" for private and two-family dwellings, churches, public schools, libraries, and accessory buildings incident to any one of the authorized uses. In district "B" the same uses are expressly authorized as for district "A" and in addition thereto farming and truck gardening, multiple dwellings, hotels, private clubs, fraternities and lodges, boarding houses, hospitals, educational, philanthropic and eleemosynary institutions, nurseries and greenhouses, buildings and uses accessory to those expressly enumerated when located on the same lot and not involving the conduct of a retail business, public garages for storage purposes only, and golf courses. The requirements imposed with reference to light, ventilation, sanitation and protection specify that every dwelling shall have windows so located as to properly light and ventilate all portions of the rooms. Outside toilets are forbidden except for temporary use during construction work on the premises, and each dwelling is required to be provided with "running water, adequate inside water closet accomodations, and sewage facilities." The ordinance further directs that each dwelling shall be placed upon a substantial foundation of mortar and stone, brick, concrete or other like material, with joists not less than one foot off the ground. The use of tents, house trailers and automobile trailers for dwelling purposes is forbidden, subject to the provision that a trailer may be used for a total period of not more than 14 days in any one year by a single family, when such trailer is located upon premises having running water and sewage facilities.

The ordinance further makes provision for building permits, for fees therefor, and for enforcement of its provisions by the supervisor of the township. A board

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of appeals is created to function in accordance with the provisions of the enabling act. A penalty by way of fine is provided for any violation of the ordinance, with authority in the court imposing the fine to require imprisonment in the county jail until the same is paid, not exceeding 30 days.

The defendant Full Salvation Union acquired title to a part of the premises in question in November, 1942, pursuant to a land contract executed in May, preceding. The balance of the land was purchased in June, 1943. The tract owned by the defendant is approximately 16-1/2 acres in extent. Following the execution of the land contract in May, 1942, the defendant corporation applied for and obtained a building permit for the construction of a tabernacle for religious purposes. A permit was also obtained for a caretaker's residence. These buildings were completed in the summer of 1942 and thereafter a camp meeting was held on the premises for a period of about two weeks. A number of small buildings were erected on the grounds, to be used as temporary dwellings by members of the Full Salvation Union during the meetings. Other small buildings were brought on the premises for the same purpose, and tents and house trailers were also used. During the camp meeting period the corporate defendant provided persons attending with meals. It is claimed that this service was rendered at cost and not for the purpose of making any financial profit. No building permits were obtained for any of the smaller residences. In the summer of 1943 a camp meeting was conducted on the premises for a somewhat longer period than that held during the preceding year. The buildings and tents in question were used for residential purposes and it appears that such use was continued in one or more instances following the termination of the camp meeting. As above noted,

the suit for injunctive relief was instituted in June, 1944.

The trial court, after listening to the proofs of the parties, concluded that the defendants had deliberately and persistently violated the township ordinance and had by their acts created a nuisance. Injunctive relief to prevent further violations and a continuation of the nuisance found to exist was granted and defendants were further ordered to remove within 30 days all structures erected in violation of the terms of the ordinance.

It is the claim of the defendants on appeal that the use made of the premises as established by the proofs was not in violation of the terms of the ordinance. Such contention, however, is not tenable. The small buildings, referred to in the record as shacks, constructed on the property or brought there for residential purposes, clearly did not comply with the requirements of the ordinance with reference to construction, sanitation, and required facilities. Such structures cannot be regarded as accessory to any other building lawfully erected on the premises. Obviously, their purpose was to facilitate the carrying on of the camp meeting. The same conclusion follows with reference to the tents which defendants permitted to be erected on the premises and which the record indicates members of the Full Salvation Union were invited to bring with them to the camp meeting. It is obvious also that the camp meeting itself was an unauthorized use of the premises on which it was conducted. In effect, defendants contend that because such meeting was held for religious purposes it should be placed in the same category as churches which, as above noted, the ordinance expressly authorizes. However, the conclusion does not follow that every place in which religious services are conducted is a church. Starks v. Presque Isle Circuit Judge, 173 Mich. 464. Webster's New International Dictionary (2d Ed.), defines a church as "A building set

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apart for public worship, esp. Christian worship." The term was clearly used in the ordinance before us with such meaning in mind. The term "camp meeting" implies a religious gathering for the purpose of conducting a series of religious services, usually in the open air or in a tent, lasting for several days, during which persons attending live in tents or temporary houses. Johnson v. Jones, 86 Vt. 167 (83 Atl. 1085); Commonwealth v. Bearse, 132 Mass. 542 (42 Am. Rep. 450). The term necessarily implies that part or all of those attending the meeting shall "camp," in the ordinary meaning of that word. Defendants' meetings were conducted in this manner, many of those attending using the small buildings or shacks referred to, and tents, for residential purposes.

The record before us indicates rather clearly that the camp meetings conducted by defendants were attended with such degree of noise as to cause disturbance to others residing in the vicinity. There is testimony to the effect that such noise continued from early in the morning until approximately 4:00 a. m. the following day. It cannot be said that such use was within the contemplation of the ordinance.

This brings us to a consideration of the principal question in the case, the validity of the zoning ordinance. Defendants claim that as construed by the township officials and by the trial court it is not a proper exercise of the police power of the State because "unreasonable, arbitrary and discriminatory." Defendants further assert, as appears from their answer, that said ordinance operates to deprive them of property without due process of law in violation of the Constitution of the United States (14th Am., 1) and the Michigan Constitution (1908), art. 2, 16. That the ordinance must stand the test of

reasonableness is not disputed. However, the presumption is in favor of validity. Courts may not properly invalidate a statute or ordinance unless the constitutional objections urged against it are supported by competent evidence or appear on the face of the measure in question. In Harrigan and Reid Co. v. Burton, 224 Mich. 564, it was said (p. 569):

> "The generally accepted rule is that a presumption prevails in favor of the reasonableness and validity in all particulars of a municipal ordinance unless the contrary is shown by competent evidence, or appears on the face of the enactment."

See, also, City of East Lansing v. Smith, 227 Mich. 495.

In Austin v. Older, 283 Mich. 667, the general rule was stated as follows (p. 674).

> "It is elementary that every intendment is in favor of the constitutionality of an ordinance and plaintiff has the burden of showing that it has no real or substantial relation to public health, morals, safety or general welfare. Zoning ordinances are constitutional in principle as a valid exercise of the police power."

Of like import is Moreland v. Armstrong, 297 Mich. 32.

Defendants cite and rely on Senefsky v. City of Huntington Woods, 307 Mich. 728. There the plaintiff instituted mandamus proceedings to compel the defendant city to issue a building permit which had been refused because the contemplated residence contained less than the usable floor space specified by the city zoning ordinance. It was held by this Court that the requirement,

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as applied to plaintiff's property, was unreasonable under the particular facts involved because having no tendency to advance or protect the public health, morals, safety or general welfare. A somewhat similar situation was presented in Frischkorn Construction Co. v. Redford Township Building Inspector, 315 Mich. 556. The facts in the case at bar, however, serve to differentiate it from the cases cited. The provisions of plaintiff's zoning ordinance, involved in this case, cannot be said to be unrelated to the public health and welfare. The requirements as to water, light and sanitation, above noted, clearly were incorporated to serve proper purposes well within the scope of the police power. It cannot be said that they do not reasonably serve such purposes. Neither does it appear that the restrictions as to the use of premises located in districts "A" and "B" are not reasonably within the scope of the authority vested in the township under the act of the legislature. Applying the general principle suggested by the decisions above cited, we find that the provisions of the ordinance in question, to which defendants object, are valid.

Defendants further claim that equity is without jurisdiction to grant the relief sought by plaintiff because the ordinance contains no provision expressly authorizing, seeking, or issuing, an injunction against violations of the ordinance. Attention is directed to Township of Warren v. Raymond, 291 Mich. 426. There the plaintiff sought to enjoin the defendant from operating a junk yard without complying with the requirements of a township ordinance entitled:

> "An ordinance to license and regulate junk dealers and junk yards and the collection and depositing of junk in the township of Warren."

Said ordinance contained no provision for its enforce-

ment by injunction. This court recognized the general rule that equity has not the power to restrain violations of criminal statutes or ordinances unless the specific facts involved form a basis for equitable relief. Attention was called to the fact that the wrecking of automobiles is not a public or private nuisance per se, and further that the pleadings did not allege a public nuisance calling for injunctive relief. A decree of the trial court granting the relief sought by plaintiff was accordingly reversed and the bill of complaint dismissed.

In the case at bar, however, the statute pursuant to which plaintiff's ordinance was adopted specifically declared in section 8 thereof, that:

> "Buildings erected, altered, razed or converted, or uses carried on in violation of any provision of township ordinances or regulations made under the authority of this act are hereby declared to be a nuisance per se. The court shall order such nuisance abated and the owner and/or agent in charge of such building or land shall be adjudged guilty of maintaining a nuisance per se."

It thus appears that under the specific terms of the statute the use made by defendants of the premises in question, and the buildings erected, in violation of the terms of the ordinance, constitute a nuisance per se.

Such result was recognized by this Court in People v. Kelly, 295 Mich. 632. An analogous provision of the prohibitory liquor law of Kansas was before the Supreme Court of the Unite States in Mugler v. Kansas, 123 U. S. 623. In discussing the effect of such provision, which in terms declared all places where intoxicating liquors were manufactured, sold, bartered or given away in violation of the provisions of the statute to be

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common nuisances, the court said (pp. 673, 674):

"The statute leaves the court at liberty to give effect to the principle that an injunction will not be granted to restrain a nuisance, except upon clear and satisfactory evidence that one exists. Here the fact to be ascertained was, not whether a place, kept and maintained for purposes forbidden by the statute, was, **per se**, a nuisance—that fact being conclusively determined by the statute itself—but whether the place in question was so kept and maintained.

"If the proof upon that point is not full or sufficient, the court can refuse an injunction, or postpone action until the State first obtains the verdict of a jury in her favor. In this case, it cannot be denied that the defendants kept and maintained a place that is within the statutory definition of a common nuisance."

See, also, Denapolis et al. v. The United States, 3 Fed. (2d) 722; Pompano Horse Club et al. v. State of Florida, 93 Fla. 415; State, ex rel. Threlkeld, County Attorney, v. Osborne, 207 Iowa 636 (223 N. W. 363); Forehand, Solicitor General, v. Moody, 200 Ga. 166 (36 S. E. (2d) 321); State, ex rel. Hunter, Attorney General, v. The Araho et al., 137 Neb. 389 (289 N. W. 545).

It is specifically provided by 3 Comp. Laws 1929, Sec. 13944, as amended by Act No. 41, Pub. Acts 1939 (Comp. Laws Supp. 1940, Sec. 13944 [Stat. Ann. 1946 Cum Supp. Sec. 27.545], that the circuit court in chancery shall have jurisdiction:

"In all matters concerning nuisances and waste,

where there is not a plain, adequate and complete remedy at law, and may grant injunctions to stay and prevent such nuisances and waste."

Plaintiff relies on this provision of the statute, claiming that it, in view of the declaration of the legislature in the enabling act under which the township ordinance was adopted to the effect that uses and structures maintained in violation of such ordinance shall be regarded as nuisances per se, gives to the courts of equity complete jurisdiction in the premises. It must be said in this connection that there is no adequate remedy at law for the enforcement of such an ordinance. Citing 2 Story's Eq., Secs. 921, 922, it was said in Mugler v. Kansas, supra. (p. 673):

"The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy, than can be had at law. They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury."

The jurisdiction of equity to restrain a nuisance was upheld by this Court in Board of Health of the City of

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Grand Rapids v. Vink, 184 Mich. 688. In that case the plaintiff sought equitable relief to restrain defendant from removing and depositing garbage within the city. The Court pointed out that the averments of fact in the bill of complaint were sufficient on which to predicate a finding that a nuisance was alleged, although the term was not used. The proofs were sufficient to establish such nuisance. It is recognized that usually courts of equity will not interfere to prevent the breach of a penal ordinance, but may properly do so under certain circumstances to prevent the continuance of a nuisance. See, also, Building Commission of the City of Detroit v. Kunin, 181 Mich. 604; Stead v. Fortner, 255 Ill. 468; City of Stockton v. Frisbie and Latta, 93 Cal. App. 277; State v. Ellis, 201 Ala. 295 (78 So. 71). Further citations will be found in the annotation in 129 A. L. R. 890 et seq.

Other questions raised by counsel for defendants in their brief, and on the oral argument, do not require discussion. They have been given consideration and found to be without substantial merit. For the reasons above indicated the decree of the trial court is affirmed with costs to plaintiff.

APPENDIX B

DECREE OF CIRCUIT COURT, KALAMAZOO COUNTY, MICHIGAN

PORTAGE TOWNSHIP

vs.

FULL SALVATION UNION et. al.

At a session of said Court held in the County Building, in the City of Kalamazoo, Michigan, on the 14th day of March A. D. 1945.

Present:

Honorable George V. Weimer,
Circuit Judge

This cause having come on to be heard upon pleadings and proofs taken in open Court and after hearing the arguments of counsel for the respective parties and the Court being fully advised in the premises, and it appearing to the Court from the said pleadings and proofs that the material allegations in the bill of complaint in this cause are true, and that said defendants have erected, maintained and used tents, cabins and/or other structures for camping and/or temporary dwelling purposes, and have suffered and permitted the use of premises controlled by them located in Portage Township, Kalamazoo County, Michigan, for camping and temporary dwelling purposes and in other manners in violation of the terms and provisions of the duly adopted Portage Township Zoning Ordinance, and have used and are threatening to continue to use said premises as a camp

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meeting ground, to which defendants intend to attract several thousand people for an indefinite period, during which they will use tents, auto trailers and non-conforming cabins for housing purposes together with the retail of foods and provisions, with the reasonable certainty that proper sanitary facilities will be impossible, or at least will not be provided, and that traffic congestion in and about the small area occupied by the camp meeting ground will be definitely hazardous as well as a pronounced nuisance to the permanent property owners in the immediate neighborhood; further that said defendants acquired the property in question for a very definite purpose, namely a camp meeting ground, with the main building or buildings and various and sundry small buildings, tents, auto house cars, comfort stations, restaurant and retail store, after the same was subject to the regulations and restrictions of the duly adopted Portage Township Zoning Ordinance; that said property was close to a long established residence district on the north shore of West Lake; further, that said defendants, by their operations on the premises and their use thereof, have grossly violated the provisions of said ordinance, the rights of property owners in the township generally, and particularly the rights of surrounding property owners, and have created a nuisance both public and private; further appearing to the satisfaction of this Court that said defendants have created and intend to continue and increase an intolerable situation, amounting to a nuisance, in close proximity, practically adjacent to the long established, desirable residence district along the north side of West Lake and because thereof said plaintiff is entitled to the relief prayed for.

It is, therefore, ordered, adjudged and decreed that said defendants and both of them are hereby enjoined

and restrained from using or suffering or permitting to be used the premises owned and controlled by them located in Portage Township, Kalamazoo County, Mich., and more particularly described in the bill of complaint on file in this cause as a camp meeting ground or in violation of any of the terms or provisions of the Portage Township Zoning Ordinance or in any manner amounting to a nuisance, either public or private.

Further ordered that said defendants and both of them are hereby enjoined and restrained from erecting, maintaining or using or suffering or permitting the use thereof of any tents, cabins, and/or other structures for camping and/or temporary dwelling purposes, or in any other manner whatsoever in violation of the terms and provisions of the Portage Township Zoning Ordinance.

Further ordered, adjudged and decreed that all structures heretofore erected on said premises without building permits or certificates of compliance as required by the provisions of the said Portage Township Zoning Ordinance, are hereby declared by this Court to be nuisances per se, and said defendants shall forthwith remove all such structures within thirty days, and in default thereof said plaintiff, by or through its agents, shall have the right to enter upon said premises and demolish or remove the same and any expense thereby incurred shall become and be a lien against said premises until paid.

Further ordered, adjudged and decreed that in the event that removal of such structures shall be made by terms of this decree and default being made in the payment of any expenses thereby incurred for a period of thirty days after such removal, any materials thereby removed from said premises may be sold at public

auction by the plaintiff and the proceeds thereof applied against the expenses incurred by such removal and the costs taxed in this suit, and the balance, if any, paid to said defendant, Full Salvation Union.

George V. Weimer
Circuit Judge

APPENDIX C

OPINION OF CIRCUIT COURT KALAMAZOO COUNTY, MICHIGAN

PORTAGE TOWNSHIP
vs.
FULL SALVATION UNION et. al.

Plaintiff seeks restraint of alleged violations and intended violations of a zoning ordinance and abatement of a nuisance allegedly involved therein.

Under the pleadings the ordinance was concededly duly adopted. Defendants claim the ordinance is unreasonable, arbitrary, confiscatory and, therefore, invalid; that they have substantially complied with its provisions, and that this Court of Equity is without jurisdiction.

Upon this record, which speaks for itself and need not be reviewed, the ordinance is not unreasonable in its application to the property involved. The ordinance does not unreasonably prohibit an enterprise, project or undertaking, such as the camp meeting ground, to which Defendants intend to attract several thousand people for an indefinite period, during which they will use tents, auto trailers, and non-conforming cabins for housing purposes, together with the retail of foods and provisions, with the reasonable certainty that proper sanitary facilities will be impossible, or at least will not be provided, and that traffic congestion in and about the small area occupied by the camp meeting ground will be definitely hazardous as well as a pronounced nuisance to the permanent property owners in the immediate neighborhood.

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The allegations in the Bill of Complaint are amply sustained, not only by the testimony of Plaintiff's witnesses, but as well also by that of all the defense witnesses, including especially Marion Andrews and James Andrews. These two men are highly intelligent, educated, artful, evasive and plausible. Having seen and heard them, it is not difficult to visualize their attitude, manner and machinations in their various contacts and dealings with the several officers, agents and employes of Portage Township. The representatives of the township apparently placed confidence in Marion Andrews, and James Andrews and their father, now deceased, and the representations made by them from time to time, and made every reasonable effort to cooperate with them. Both Marion and James Andrews constantly sought to and did circumvent and overreach the representatives of the Township and the efforts of the latter to compel compliance with the ordinance.

Defendants acquired the property in question for a very definite purpose, namely, a camp meeting ground, with a main building or buildings, and various and sundry small buildings, tents, auto house cars, comfort stations, restaurant and retail store.

This property is close to a long established desirable residence district on the north side of West Lake and was subject to the regulations and restrictions of the duly adopted zoning ordinance when purchased by defendants. Defendants either did not know or did not care about the regulations and restrictions of the zoning ordinance. From the beginning they have engaged in a continuous, studied undertaking to evade and circumvent the plain and reasonable terms of the ordinance and the regulations there-under. Their assurances of an intention to do otherwise have been insincere and mere

pretense. There has been at no time a good faith effort on their part to comply with the ordinance. Their entire obvious program and procedure have been and are insiduous. The word "insiduous" is used advisedly. By their operations on the premises and their use thereof Defendants have grossly violated the provisions of the ordinance, the rights of property owners in the township generally, and particularly the rights of surrounding property owners, and have created a nuisance both public and private. It is clear that they propose and intend to continue and increase such use of the premises. Coupled with their religious activities, admittedly they intend to serve as many as five thousand people commercially for an indefinite period during the summer months on the comparatively small piece of land in question.

Defendants have created and intend to continue and increase an intolerable situation amounting to a nuisance in close proximity, practically adjacent to the long established desirable residence district in which some homes are occupied during the summer months and others throughout the year.

The rights of the property owners of Portage Township may not be impaired through the credulity of the officers, agents or employees of the township in their dealings with Defendants. Neither may Defendants, through and by means of their devious, dubious and deceitful practices, acquire rights respecting the use of their property in contravention of the ordinance worthy of protection or respect.

Plaintiff may have Decree.

GEORGE V. WEIMER
Circuit Judge of the County
of Kalamazoo, Mich.

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APPENDIX D

PORTAGE TOWNSHIP ZONING ORDINANCE

An ordinance regulating, restricting and districting the location of residences, trades, industries, businesses and the location of buildings and accommodations designed for specific uses; regulating and limiting the height and bulk of buildings hereafter erected or altered; regulating and determining the area of yards, courts and other open spaces surrounding buildings; regulating and limiting the density of population; establishing regulations for the light, ventilation, sanitation and protection of such buildings; and for said purposes dividing the township into districts and establishing the boundaries of said districts; providing for building permits and supervising officers and prescribing penalties for the violation of its provisions, as amended.

Section 1. Definitions:

Accessory Building, Class "B" Residence District: A subordinate building or portion of main building, the use of which is incidental to that of the main building; also any farming stables, barns or other buildings located upon lands being used for farming and truck gardening and for the purpose of carrying on such business upon the premises.

Dwelling, Private: a building occupied by but one (1) family alone.

Dwelling, Two Family: a building occupied by but two (2) families alone.

Dwelling, Multiple: a building or portion thereof oc-

cupied otherwise than as a private or two-family dwelling.

.....

Section 2. Use District Regulations:

In order to regulate and restrict the location of trades and industries and the location of buildings erected or altered for specific uses, the Township of Portage shall be divided into "Use Districts," of which there shall be five, known as:

"A" Residence District
"B" Residence District
"C" Local Business District
"D" Commercial and Industrial District
"E" Industrial District

The Township of Portage shall be divided into five Use Districts and the boundaries of such districts shall be as herein described and as such are shown upon the map attached hereto and made a part of this ordinance, such map being designated as the "Use District Map of the Township of Portage, Kalamazoo County, Michigan, 1942," showing districts for use regulations and the said map and all notations, references and other things shown thereon shall be a part of this ordinance with such effect as herein set forth.

Except as herein provided, no building shall be erected or altered, nor shall any building or premises be used for any purposes other than is permitted in the Use District in which such building or premises is located.

Section 3. "A" Residence District.

In the "A" Residence District no building or

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premises shall be used and no building shall be hereafter erected or altered, unless otherwise provided in this ordinance, except for one or more of the following uses:

1. Private and two family dwellings
2. Churches
3. Public Schools
4. Libraries
5. Accessory buildings and uses incident to any of the above uses when located on the same lot and not involving the conduct of a retail business, including one private garage when not located less than sixty (60) feet from the front lot line or in a fireproof compartment as a part of the main building, and including also home occupations engaged in by the occupants of a dwelling not involving the conduct of a retail business on the premises, and including also the office of a physician, surgeon, dentist, musician, artist, or similar vocations, when situated in the same dwelling used by such physician, surgeon, dentist, musician, artist, or similar vocations, as his or her private dwelling provided no name plate exceeding three (3) square feet in area containing the name and occupation of the occupant of the premises, nor a sign exceeding eight (8) square feet in area pertaining to the lease, hire or sale of a building or premises shall be permitted in any "A" Residential District.

Section 4. "B" Residence District.

In the "B" Residence District no building or premises shall be used and no building shall be hereafter erected or altered, unless provided in this ordinance, except for one or more of the following uses:

1. Any use permitted in the "A" Residence District.

2. Farming and truck gardening, together with the right to sell on the premises at wholesale or retail any goods or products produced upon the said premises; including the right to erect any necessary farming stables or barns or other buildings or outbuildings for the shelter of any number of animals incident to the carrying on of the pursuit of farming or truck gardening upon the premises, and including the incidental right to board and/or keep horses for hire.

3. Multiple Dwellings.

4. Hotels.

5. Private clubs, fraternities, lodges, excepting those the chief activity of which is a service customarily carried on as a business.

6. Boarding Houses.

7. Hospitals.

8. Institutions of an educational, philanthropic or eleemosynary nature, not including penal or correctional institutions.

9. Nursery and greenhouses.

10. Accessory buildings and uses customarily incident to any of the above uses when located on the same lot and not involving the conduct of a retail business, except as set forth in No. 2 of this section.

11. Public garages for storage purposes only . . .

12. Golf courses, consisting of not less than nine hole standard size courses, and excluding so-called midget, pitch or putt courses, together with the right to sell on the premises soft drinks and goods inci-

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dental to the carrying on of the business of a golf course.

Sections 5, 6 and 7 relate to other use districts. (omitted).

Section 8 Non-conforming Uses.

(Permits continuance of nonconforming uses at the time of adoption of ordinance with certain limitations.)

Section 9. Setback and Side Line Spacing. (omitted).

Section 10. Area Requirements.

The building width of houses and other structures in "A" Residence Districts and "B" Residence Districts shall be as limited by other sections of this ordinance. Every dwelling hereafter erected shall contain not less than 400 square feet of first floor space.

Section 11. Use District Boundaries.

. . . . . .

The Use Districts defined by this ordinance shall be and are established as follows:

"UNPLATTED LAND"

. . . . .

Section 23, Town 3 South, Range 11, West:

"B" Residence District: All of section 23 except that part herein described as "C" Local Business District.

(Land of Full Salvation Union is in Section 23, a part of the "B" Residence District.)

. . . . . .

Section 12. Light, Ventilation, Sanitation and Protection Requirements.

1. (omitted.)

2. Every dwelling hereafter erected shall be provided with running water, adequate inside water closet accommodations, and sewage facilities.

3, 4 and 5, (omitted).

6. Every dwelling hereafter erected shall be placed upon a substantial foundation of mortar and stone, brick, concrete or other similar or like materials; all joists shall be not less than one foot off the ground; all exterior walls shall be finished with butt wood siding, wood shingles, asbestos-cement shingles or siding, stucco on metal lath, masonry veneer or other similar standard siding materials. No roll roofing material shall be used for exterior siding purposes; all wood exterior finish shall be painted or similarly protected; all roofs shall be finished with asphalt, asbestos, or wood shingles, or other standard roofing material or materials of a permanent nature and construction; no tar paper or other similar materials shall be used as a permanent exterior roofing; all chimneys shall be of approved masonry or reenforced concrete and shall extend at least two and one-half feet above the highest point of the roof of the building on which they are constructed and shall be wholly supported on a substantial ground foundation.

7. (omittted).

Section 13. Tents and Automobile Trailers; other Unlawful Uses.

Tents, house trailers and/or automobile trailers shall not be used for dwelling purposes within the

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township limits, provided, however, that house trailers or automobile trailers may be used for temporary dwelling for a total period of not more than 14 days in any one year by any one family when located upon premises having running water and sewage facilities, and provided further that automobile trailers and house trailers may be occupied for dwelling purposes within duly licensed house trailer camps and subject to the requirements thereupon imposed.

The keeping of pigs or hogs is prohibited in properties platted for residential purposes within the use district boundaries.

Section 14. Enforcement.

It shall be the duty of the Supervisor of Portage Township to enforce the provisions of this ordinance.

Section 15. Building Permits.

No premises shall be occupied or used, and no building shall be erected, and no building now or hereafter erected shall be altered or shall be changed in use, until a certificate of compliance shall have been issued by the inspector duly appointed by the Portage Township Board, stating that the building according to the plans for its erection or alteration complies with the building and health laws and ordinances and with the provisions of these requirements.

Section 16. Board of Appeals.

The Township Board shall act as a Board of Appeals upon all questions arising under this ordinance and in accordance with the provisions of Act No. 302 of the Public Acts of the State of Michigan for 1937, as amended.

Section 17. Violation, Penalty (omitted).

Section 18. Validity (omitted).

Section 19. Effective Date of Ordinance.

This ordinance shall take effect on January 16th, 1942.

Section 20. Conflicting Provisions Repealed (omitted).

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IN the SUPREME COURT of the UNITED STATES

October Term 1947

Appeal Docket No. 609

FULL SALVATION UNION
(a Michigan Religious Corporation) and
J. F. ANDREWS,
Appellants

vs.

PORTAGE TOWNSHIP
(Kalamazoo County, Michigan)
Appellee.

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR REHEARING

Appellants submit this Petition for Rehearing pursuant to Rule 33 of this Court. On March 15, 1948, the Appeal in the above entitled cause was denied Per Curiam on the ground that a substantial federal question was not involved, one Justice holding that probable jurisdiction should be noted and another Justice holding that the question of jurisdiction should be postponed until after a hearing on the merits.

We respectfully represent to the Court that substantial federal questions are involved for these reasons:

TO DENY THIS APPEAL MEANS:

I. Denial of the right to carry on a Camp Meeting.

II. Denial of the right to use one's own property to to carry on a Camp Meeting.

III. Denial of the right to build a Church.

IV. Denial of the right to use one's own property for a Church.

A. As To The Camp Meeting

TO DENY THIS APPEAL MEANS:

I. Denial of the right to carry on a camp meeting. Appellants will be totally excluded from carrying on the religious activity of a camp meeting anywhere in Portage Township—a wholly rural area of 36 square miles.

The ordinance is construed and applied to forbid absolutely a camp meeting use at any time and anywhere in Portage Township and under any circumstances.

A camp meeting is a lawful religious activity.

A zoning ordinance cannot wholly forbid a lawful religious activity regardless of any other facts or circumstances.

The facts established at the trial as contained in the Record and as set forth in the Jurisdictional Statement demonstrate that the camp meeting use of appellants is a lawful activity in the place, in the spot, where carried on. The 15 acre tract of woods is an ideal location and the camp meeting use thereof is reasonable in relation to the surrounding farm and vacant property.

To deny absolutely to appellants this camp meeting use in Portage Township is an unreasonable abridgement of religous freedom guaranteed by Amendments I and XIV of the U. S. Constitution.

TO DENY THIS APPEAL MEANS:

II. Denial of the right to use one's own property to

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carry on a camp meeting. The 15 acre tract of woods owned in fee, the tabernacle (a building 60' x 60', seating 500 persons), the caretaker's cottage, a year-round residence (a building 20' x 20') and the garage in connection therewith, all erected under building permits and mostly by donated labor, **will be rendered wholly useless** to Full Salvation Union since they canot be used for the religious activity of a camp meeting.

A camp meeting use on the property of Full Salvation Union, in Portage Township, being a reasonable use, the ordinance and the injunction deprive Full Salvation Union of its property contrary to the due process of law guaranteed by Amendment XIV of the U. S. Constitution.

B. As To The Church

TO DENY THIS APPEAL MEANS:

III. Denial of the right to build a church. Appellants will be arbitrarily prevented from completing the partially constructed church building on the property of Full Salvation Union in Portage Township and will be prevented from holding services therein.

Appellants are ordered by the injunction to remove said building solely because the Township Board arbitrarily refused to grant a permit for its construction. The Board granted informal permission to erect the church building and then later arbitrarily refused to grant a formal permit for its construction and appellants are ordered by the injunction to remove all buildings erected without permits. Consequently appellants will not be able to complete the building and hold religious services therein each Sunday during the year.

Arbitrary refusal to permit the construction of a church building for religious worship is an unreasonable

abridgement of religious freedom guaranteed by Amendments I and XIV of the U. S. Constitution.

TO DENY THIS APPEAL MEANS:

IV. Denial of the right to use one's own property for a church. The partially constructed church (a building 24' x 30') erected by donated labor for religious worship, a lawful use under the ordinance **must** under the terms of the injunction, together with the toilet system and the large septic tank in connection therewith, **be removed and rendered useless** to Full Salvation Union, since such property cannot be used either in connection with the camp meeting or for year round religious services.

Such deprivation of property is contrary to the due process of law guaranteed by Amendment XIV of the U. S. Constitution.

DENIAL of the right to carry on a Camp Meeting—

DENIAL of the right to use one's own property to carry on a Camp Meeting—

DENIAL of the right to build a Church—

DENIAL of the right to use one's own property for a Church—

These are gross violations of the fundamental rights of appellants to religious freedom and the reasonable use of property in its exercise.

To raise these questions, under the law as hereinafter discussed, as to the authority of Portage Township to deprive appellants of these fundamental religious and property rights under Amendments I and XIV of the U. S. Constitution, it is submitted, is to raise substantial federal questions.

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DISCUSSION OF LAW

The injunction by which appellants are being deprived of these Constitutional rights is invalid—

A. AS TO THE CAMP MEETING

Point One

Because the **blanket exclusion** by the ordinance of the Camp Meeting use from the entire Township, an area of 36 square miles, is **arbitrary and unreasonable.**

BLANKET EXCLUSION
UNREASONABLE

By the ordinance all 36 square miles of the 36 sections in the Township are placed in the A-Residence district (3 sections) and the B-Residence district (33 sections) with exceptions therefrom (a) of small areas for C, D and E use districts where Local Business, Commercial and Industrial uses are conducted, and (b) of land covered in 51 recorded plats of which 32 are entirely restricted to A or B-Residence and 17 are entirely restricted to A or B-Residence with small exceptions for C and D districts where Local Business, Commerce or Industry is located, leaving 2 plats for C, D and E uses now devoted to Local Business, Commerce and Industry. Thus practically the entire Township is restricted to A and B-Residence.

By the ordinance, last paragraph of Sec. 2, and Sec. 3 as to A-Residence and Sec. 4 as to B-Residence, no building or use is possible unless authorized and a Camp Meeting use is not authorized in A or B-Residence districts—the only possible areas in the Township. As acknowledged by the Board and by the attorney for the Township they "never thought of a Camp Meeting when

the ordinance was drawn up" (Record 235), and the prohibition of tents throughout the entire Township "was an oversight when they drew up the ordinance" (Record 244). Hence a Camp Meeting use is completely excluded from Portage Township.

Such a blanket exclusion of a legitimate religious use from an area of 36 square miles is **arbitrary** and **unreasonable** since it has no relation to health, safety, morals or general welfare. Therefore, the injunction which rests on the blanket exclusion is invalid, as a denial of religious freedom guaranteed by Amendments I and XIV of the U. S. Constitution.

Blanket exclusion of distribution of literature by an ordinance is held invalid.

Martin v. City of Struthers, Ohio
319 U. S. 141 (1943)

Schneider v. State (first 3 cases)
308 U. S. 147 (1939)

Jamison v. Texas
318 U. S. 413 (1943)

and likewise the right to hold a Camp Meeting in Portage Township "may not be prohibited at all times, at all places, and under all circumstances."

An ordinance closely analogous to that in the instant case was held unreasonable because out of 2500 acres only 1 1/10 acres were designated as an "unrestricted district" for business uses and it was already fully occupied.

Ex parte White
195 Cal. 516, 234 Pac. 396 (1925).

An ordinance was held invalid where the Board had relegated "business and industry to a very small sec-

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tion," of the village, "in order to preserve it as a secluded quiet community of one-family detached homes."

Dowsey v. Village of Kensington
257 N. Y. 221, 177 N. E. 427 (1931)

A zoning ordinance which excluded a tuberculosis hospital from every part of the town was held invalid on the ground that it could not wholly exclude a legitimate use.

Jewish Consumptives' Relief Society v. Town of Woodbury
230 App. Div. 228, aff'd 256 N. Y. 619 (1931)

On this point alone, that a blanket exclusion from 36 square miles is unreasonable, the injunction should be dissolved.

Possibility of Rezoning

Nor is the blanket exclusion or the injunction saved by any possibility of rezoning.

The 15 acre tract of woods is in Section 23 and zoned as B-Residence. If the tract were rezoned into C-Local Business, the Camp Meeting use would be possible but such rezoning was either arbitrarily refused by the Township Board or the Board had no power to rezone so that the injunction resting on the blanket exclusion is invalid.

REZONING ARBITRARILY REFUSED

By Sec. 1 of Public Act No. 69, 1939, of Michigan, the Township Board is given authority to "restrict and determine the areas within which given forms of land utilization shall be prohibited or encouraged. . ."

Under date of Dec. 13, 1943, and at the Board meeting on Dec. 22, 1943, appellants requested an amendment

(Record 62-63, 236-7) and the request was repeated July 13, 1944 (Record 66-67) and was the substance of Appellants' lengthy negotiations with the Board from Nov. 5, 1943 to July 14, 1944, (Record 56, 62-3, 66-67, 226-7, 230-239), but at no time would the Board take formal action to rezone the 15 acres of woods into Zone C although the Board did take such action for others (Record 67-68).

The Board's refusal to rezone was unreasonable and arbitrary as shown by the nature of the property and its relation to surrounding property as fully described in Appellant's Jurisdictional Statement and hereinafter developed in Points II and III. The arbitrary refusal to rezone will not support the injunction.

City of W. Uni. Place v. Ellis
134 S. W. (2nd) 1038 (Com. App. Tex., 1940)

Regardless of the foregoing it has been held that application for rezoning or amendment of the ordinance is not necessary in order to assert one's rights to his property when an ordinance is arbitrary and unreasonable.

Euclid v. Ambler Co. 272 U. S. 365, 386 (1926)

Dowsey v. Village of Kensington (headnote No. 3 and citing Euclid v. Ambler p. 228)
257 N. Y. 221, 228, 177 N. E. 427 (1931)

NO POWER TO REZONE

Basing the Board's refusal to rezone on lack of power to rezone is just as fatal to the validity of the injunction.

The ordinance was adopted January 16, 1942, pursuant to Public Act No. 302, 1937, as amended by Public Act No. 69, 1939. By Public Act No. 184, eff. July 30, 1943, a new statutory system for Township zoning was adopted and Public Act No. 302, 1937, as amended, was

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repealed but by Sec. 26 prior ordinances continued effective until a new ordinance should be adopted. Under this state of the statutes, Portage Township or its Board had no authority to amend the ordinance. "Section 26 does not in express language purport to authorize the amendment of previously adopted ordinances and as the power to amend ordinances is an incident to the power to enact them, it is my opinion that a revocation of the power to enact likewise operates as a revocation of the implied power to amend in the absence of express language or a clear intent to the contrary". **Op. Atty. Gen'l Mich.**, Nov. 16, 1943, No. O-1558.

This statutory impasse made it impossible for the Township or its Board to amend the ordinance to rezone the 15 acres of woods from B-Residential to C-Local Business and to comply with constitutional requirements of reasonableness and thereby rendered the ordinance inoperative and invalid as to the Camp Meeting use.

To leave no discretion in the Township Board makes the ordinance unconstitutional. In **Eubank v. Richmond** 226 U. S. 137 "The ordinance was held bad by this court (p. 143) because it left no discretion in the committee." Gorieb v. Fox 274 U. S. 603, 610 (1927).

Hence the rigid ordinance exclusion of the Camp Meeting use from the entire 36 square miles is unreasonable and arbitrary and will not support the injunction.

That the Michigan statutes were amended on Oct. 11, 1947 [Mich. Stat. Ann. 1947 Cum. Supp. Sec. 5.2963 (26)], two days before the Michigan Supreme Court's opinion was filed on Oct. 13, 1947 in this case, to remedy this inflexible situation by making ordinances under Act of 1937 operative under the Act of 1943, cannot affect appellants' rights to have the Circuit Court's injunction of March 14, 1945 dissolved.

Point Two

The injunction is invalid because the **exclusion from B-Residence district** in Portage Township of a Camp Meeting use is **arbitrary and unreasonable—**

TEST OF REASONABLENESS
CHARACTER OF RESTRICTED AREA

One test of reasonableness of an exclusion of a use by a zoning ordinance is the character of the restricted area as shown by its development and the uses therein permitted and conducted.

Portage Township is wholly rural having no urban areas. Portage Center having a gas station, barber shop, post office and fire station, where the Township Board meets is the center of activity (Record 53, 86-87).

As stated above, 33 sections of the Township are placed in B-Residence district. Appellants land is in Sec. 23, a part of the B-Residence district. The uses authorized in B-Residence district are private and two family dwellings, churches, public schools, libraries, farming and truck gardening including "necessary farming stables or barns or other buildings or outbuildings for the shelter of any number of animals," multiple dwellings, hotels, private clubs, boarding houses, hospitals, institutions of an educational, philanthropic, or eleemosynary nature, nursery and greenhouses, accessory buildings, public garages and golf courses (Ordinance, Sec. 4).

Appellants' Camp Meeting use is not so different from these as to justify exclusion.

Denial of the right to construct and to use buildings for an orphanage in a residential suburb of Cleveland, Ohio was held unreasonable because "the proposed use is not so different in character from concededly legitimate

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uses as to bring it within the scope of the police power of the municipality."

Village of Uni. Heights v. Cleveland Jewish Orphans Home.
20 F. (2d) 743 (C. C. A. 6th, 1947) cert. den. 275 U. S. 569 (1927).

Denial of the right to use property, acquired after adoption of ordinance, for an old ladies' home in the most restricted residential district of Kansas City, Mo., was held unreasonable because "not an essential of the general zoning plan...and so arbitrary and unreasonable as to be void."

Women's Kansas City St. Andrew Soc. v. Kansas City, Mo.
58 F. (2d) 593 (C. C. A. 8th, 1932)

Denial of the right to construct a church in a residential district of Reno, Nevada, was held unreasonable and void as violating "Due Process provisions of both the Constitution of the United States and the Constitution of the State of Nevada," the Nevada Supreme Court stating:

"The validity of Sections 7 and 8 of the Zoning Ordinance has been challenged on several grounds, but we have found it necessary to consider but one. The great weight of authority convinces us that these sections, as applied to the property involved in this case, bear no substantial relationship to the promotion of the health, safety, morals, convenience, property or general welfare of the City of Reno, or of its Residential District, and that they constitute an invasion of the property rights of petitioner corporation." [The court citing]

Roman Catholic Archbishop v. Baker
140 Or. 600, 15 P. (2d) 391

Village of Uni. Hts. v. Cleveland Jewish Orphans Home
6 Cir., 20 F. (2d) 743

Women's Kansas City St. Andrew Soc. v. Kansas City, Mo.
8 Cir., 58 F. (2nd) 593

Western Theo. Seminary v. Evanston
325 Ill. 511, 156 N. E. 778

City of Miami Beach v. State
128 Fla. 750, 175 So. 537

State of Wash. ex. rel. Seattle T. T. Co. v. Roberge
278 U. S. 116—

And the court continued: "As against these authorities, cases involving livery stables, garages, gasoline stations, funeral parlors, billboards, two-family residences, morgues, launderies etc. afford us little aid in the instant case. The law distinguishes between such cases and those relating to churches, schools, parks and playgrounds, art galleries, library buildings, community center buildings etc."

State ex rel. Roman Catholic Bishop of Reno v. Hill, 59 Nev. 231, 90 P. (2nd) 217 (1939).

Denial of the right to construct a church in a residential suburb of Columbus, Ohio, was likewise held unreasonable and void in

State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph et. al.
139 Ohio State 229, 39 N. E. (2nd) 515 (1942)

Denial of the right to construct a church in Class A-Residential district of City of Mesa, Ariz., was held "clearly arbitrary and unreasonable" since within the district "storage of fertilizer, maintenance of horses,

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cows, swine, farms, greenhouses, swimming pools, polo fields and golf courses as well as schools and the like was permitted."

Ellsworth, Bldg. Inspector v. Gercke
62 Ariz. 198, 156 Pac (2nd) 242 (1945)

Other cases applying the same principle include:

City of Amarillo v. Stapf
109 S. W. (2nd) 258 (Civ. App. Tex., 1937)

Del Fanta v. Sherman
107 Cal. App. 746, 290 Pac. 1087 (1930)

Pacific Palisades Assn. v. City of Huntington Beach
196 Cal. 211, 237 Pac. 538 (1925)

Appellants' Camp Meeting use in a 15 acre tract of woods surrounded by farm and vacant property is clearly analogous in fact and principle. The exclusion of appellants' Camp Meeting use from B-Residence district in Portage Township is likewise arbitrary and unreasonable. On this point alone the injunction should be dissolved.

Point Three

The injunction is invalid because the **exclusion from the 15 acre tract of woods** of the Camp Meeting use in relation to the surrounding property is **arbitrary and unreasonable.**

TEST OF REASONABLENESS "BEST USE" OF LAND INVOLVED

Another or additional test of the reasonableness of exclusion of a use is: What is the "best use" of the land involved, including its relation to the immediately surrounding property.

The 15 acre rectangular tract of woods is wholly surrounded by farm and vacant property. On the north side is an orchard; on the east side is Oak Ridge Street, a dirt road, and beyond is farm land; on the south side is farm property called Ames West Lake Park, Annex No. 1 which is entirely vacant and beyond is the road, Forest Drive (formerly Ames Drive); on the west side is Newell's Lane, a 33 ft. road and beyond is farm land and one house valued by the supervisor at $800, located 220 ft. west of the tabernacle, and about 1/4 mile farther west is the road called Lover's Lane (Record 100-108, 128, 143).

That the 15 acre tract of woods is ideal for Appellants' Camp Meeting use is clearly established by the testimony. A witness for Appellants testified:

Q. Why was it that you selected this property . . .

A. Well, we were looking for property and I saw an ad in the paper of some property out on Lover's Lane there, back from the road, and I went out to look at that, and that wasn't desirable because it was quite low and there were not very good trees on it. It wasn't desirable at all, and the real estate man, Mr. Early, told me—said, "There is one other piece of property that is just ideal for what you want" so he took me out and showed me these woods at West Lake.

. . . . . .

We looked over the woods and then my father came over and I told him about it. He went out and looked it over. It met his eye. He had experience with Camp Meetings for about forty years, and it met his eye. He thought it would be very ideal. We went out and talked to Mr. Early and talked with Mr. Mein (Fire Chief who issued permits) and in a few days we consummated the

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deal. For our purpose we thought it was very desirable property. (Record 162-163)

Mr. Corstange—a realtor 38 years who developed a number of subdivisions around Kalamazoo and owned this 15 acre tract of woods for 17 years—testified: "I had it surveyed and staked and put on a sale in 1925. I spent approximately $500 in attempting to dispose of the lots and was able to sell only two (never improved). I did advertise them. I couldn't sell them because it was too far from the lake and too far from transportation. It was from the lake, should say a quarter of a mile possibly." When asked his opinion as a realtor as to demand for such lots he stated: "I soon found out there was no demand for them."

Q. Even in 1943?

A. 1943.

He sold the 15 acres of woods at $125 per acre ($25 per acre less than he paid for it) to a Mr. Shippers on April 16, 1941, who "was going to clear off some and use it for pasture" but abandoned this purpose and put it in the hands of a real estate agent, Mr. Early, and it was sold May 4, 1942 to appellant, Full Salvation Union (Record 170-186)

The 15 acres of woods and the buildings erected thereon will be useless to Full Salvation Union if the denial of the Camp Meeting use by the injunction is allowed to stand. A witness for appellants testified: (Record 203):

Q. You mentioned the tabernacle; is that equipped for year round use?

A. No, it isn't. It is just for Camp Meeting purposes in the summer.

Q. Would that be of much value to you without provision for camp grounds, camp meetings?

A. It would be of no value at all as far as the purpose of erecting it is concerned.

That appellants are making the "best use" of the 15 acre tract of woods is apparent from these facts—which makes denial of the use unreasonable, as held in numerous analogous cases.

Denial of a business and industrial use in a residential district of City of Cambridge, Mass., so that "the locus is of comparatively little value for the limited uses permitted by the ordinance" made the ordinance unreasonable in relation to the uses and development of surrounding property.

Nectow v. Cambridge
277 U. S. 183 (1928)

Denial of an industrial use for a 53-acre tract in a residential district of Chicago was held unreasonable, on evidence that "the highest and best use to which the 53-acre tract, including plaintiff's property, can be put, is manufacturing and industrial; that the 53-acre tract is not suitable for apartment or residential development because of the nature of the surrounding property and the soil conditions; that there is ample vacant property in the surrounding district available for apartment and residential purposes....."

2700 Irving Park Bldg. Corp. v. City of Chicago
395 Ill., 138, 69 N. E. (2nd) 827 (1946)

the court citing (p. 833):

Taylor v. Village of Glencoe
372 Ill. 507, 25 N. E. (2nd) 62

Reschke v. Village of Winnetka
363 Ill. 478, 2 N. E. (2nd) 718

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Tews v. Woolhiser
352 Ill. 212, 185 N. E. 827

Forbes v. Hubbard
348 Ill. 166, 180 N. E. 767

Denial of a business use for a lot in a residential district of a residential suburb of Houston, Texas, was held arbitrary and unreasonable and the "city could not enjoin lot owner from constructing building on lot for business purpose in violation of zoning ordinance, where defendant's lot was practically worthless as residential property."

City of W. University Place v. Ellis
134 S. W. (2nd) 1038 (Com. App. Tex., 1940)

citing Nectow v. Cambridge, **supra**, and many other cases.

Denial of a business or apartment house use on a lot peculiarly adapted thereto, in a residential district of village of Kensington in the Great Neck section of Long Island, N. Y., was held unreasonable, where the Board had relegated "business and industry to a very small section" of the village "in order to preserve it as a secluded quiet community of one-family detached homes."

Dowsey v. Village of Kensington
257 N. Y. 221, 177 N. E. 427 (1931)

Since Appellants are making the "best use" of the 15 acre tract of woods which has not been capable of development otherwise and since it is surrounded by farm and vacant property, the exclusion of the Camp Meeting use therefrom is arbitrary and unreasonable. For this reason alone the injunction should be dissolved.

Point Four

The injunction against the Camp Meeting use is

invalid because Appellants had acquired a **vested property** right to carry on the Camp Meeting on the 15 acre tract of woods.

In May, 1942 and thereafter the Township Board had authority to authorize the Camp Meeting use under Public Act No. 302, 1937 as amended by Public Act No. 69, 1939, Sec. 1 thereof providing: "The Township Board . . . may . . . restrict and determine the areas within which given forms of land utilization shall be prohibited or encouraged, and for such purposes divide any such township into districts . . . For each of such districts regulations may be imposed . . . Such regulations . . . shall be made with reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses. . . ."

In 1942 before purchasing the property, E. A. Andrews and Marion Andrews, agents of Full Salvation Union explained in detail the contemplated Camp Meeting use of the land to the legal representative of the Township Board, Mr. Mein–the Fire Chief (Record 56, 92, 151-2, 162-4) who was authorized to issue building permits (Record 52, 56, 84, 86-87, 118) and in reliance upon his approval of the use (Record 152) the property was purchased May 4, 1942 (Record 180).

On May 12, 1942, Full Salvation Union applied for and was issued 2 building permits (Record 46, 48, 90-91, 153-4), one for construction of a tabernacle with **wood shavings** for floor, but **no chimney** and **no heating unit** (Record 46-47, 206); the other for a caretakers home, a year round residence, on the Camp Meeting property (Record 48-49). Both were constructed in summer of 1942 (Record 120, 133, 283).

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Also in 1942 Full Salvation Union had the property exempted from taxes (Record 119, 152) by the Supervisor who is charged with enforcement of the ordinance (Sec. 14; Record 118) and is chairman of the Township Board (Record 324.) The Supervisor testified that he inspected the premises in 1942 and watched the camp ground development from the start (Record 120) and saw some of the accessory buildings (cottages and cabins to be occupied during meetings) in 1942 and the others in 1943 (Record 120, 123).

The Fire Chief testified that he and the Supervisor approved outdoor toilets to be placed back in the woods for use during the summer meetings and until modern toilet facilities could be provided (Record 92-93, 154-5).

Two of the accessory buildings were built in summer of 1942 (Record 120, 195, 283) and the others (12) were built in summer 1943 (Record 120, 283-4).

A Camp Meeting was held on the grounds June 26 to July 5, 1942, (Record 192, 223) and a Bible School, August 18-28, 1942 (Record 192, 225, 245), and in the summer of 1943 a Camp Meeting and Bible School were held on the grounds (Record 196) and again in 1944 (Record 114).

Officials of the Township had knowledge of erection of the 14 accessory buildings and these religious meetings, when in November 1943 application was made to the Fire Chief for a permit to construct a garage for the caretaker's home (Record 234).

The permit was held up by the Fire Chief and the Supervisor until the Board met (Record 234-5).

At the Board meeting on Nov. 26, 1943, the permit for the garage was held up by the Board until the accessory buildings were made to comply with the ordinance (Record 64, 77, 87, 122, 242-3, 287).

Then at the meeting of the Board on Dec. 22, 1943, after many discussions with representatives of Full Salvation Union and with full knowledge of all prior operations on the camp ground (Record 43, 56, 63-64, 65, 125-6, 151-2, 238-9, 285, 304) the Township Board officially approved issuance of the permit (Record 59, 77, 122, 135, 242) for the "caretakers garage for his car and tools and whatever he had to work with there" on the camp ground (Record 87, 136) and the permit was issued the same day by the Fire Chief (Record 87-89, 90).

By this course of action by the Township officers and by official action of the Township Board itself, under statutory authority possessed by the Board, and the purchase of the property and expenditure of money and labor in constructing the tabernacle, caretakers home and garage, and numerous accessory buildings by Full Salvation Union and its members, the Camp Meeting use of the property was fully ratified, approved and established as a lawful use and became a **vested right** in Full Salvation Union of which it cannot be deprived under Amendment XIV of the U. S. Constitution. It was so held on analogous facts in

City of Evansville, Ind. v. Gaseteria, Inc.
51 F. (2nd) (C. C. A. 7th, 1931)

The rule is well established that, where a building permit has been issued without fraud to one who has thereafter in good faith expended money in reliance thereon, such owner attains an interest in such permit which is in the nature of a vested right and under such circumstances such permit may not be arbitrarily revoked.

Dobbins v. Los Angeles
195 U. S. 223 (1904)

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Herskovits v. Irwin
299 Pen. 155, 149 A. 195 (1930)

City of Buffalo v. Chadeayne
134 N. Y. 163, 31 N. E. 443 (1892)

Rehmann v. City of Des Moines
200 Ia. 286, 204 N. W. 267 (1925)

Lerch v. City of Duluth
88 Minn. 295, 92 N. W. 1116 (1903)

Hinman v. Clarke 121 App. Dw. 105,
105 N. Y. S. 725, Aff'd 193 N. Y. 640 (1908)

Grimmer v. City of Spokane
64 Wash. 388, 116 P. 878

Pelham View Apts. v. Switzer
130 Misc. 545, 224 N. Y. S. 56 (1927)

The foregoing argument is based on the proposition that the Board had the statutory authority and did approve the Camp Meeting use, but it can also be argued in the alternative, that inasmuch as the ordinance was invalid and inoperative between July 30, 1943 and Oct. 11, 1947, because of lack of power to amend it and thereby comply with constitutional requirements of reasonableness, as explained above under Point I, Appellants clearly acquired a vested right after July 30, 1943, which could not be taken away by the injunction on March 14, 1945.

Furthermore, because the wooded tract is peculiarly suited to the Camp Meeting use and because a Camp Meeting use requires a property of a particular character, today seldom available, that is, a tract having trees and drainage suitable for camping for a few hundred persons, that will comply with state health requirements (Record 25-34, 325-7) and located not too far from urban areas

and highways and yet far enough removed from traffic and urban and industrial and commercial activity that would interfere with outdoor religious meetings—because the property is of this character, Appellants claim that the right of Full Salvation Union in the 15 acre tract is analogous to that recognized by this Court in its **quaere** raised in **Hadacheck v. Los Angeles** 239 U. S. 394 (1915) where an ordinance forbidding brick making in a residence district was upheld but **"quaere** whether prohibiting of digging the clay and moving it from that section would not amount to an unconstitutional deprivation of property without due process of law."

Ex parte Kelso 147 Calif. 609 was cited with approval, "wherein the court declared invalid an ordinance absolutely prohibiting maintenance or operation of a rock or stone quarry" in San Francisco.

The same principle was applied to a gravel pit:

Terrace Park v. Errett

12 F. (2nd) 240 (C. C. A. 6th) 1926

the court stating (p. 243) "There is also a substantial difference between an ordinance prohibiting manufacturing or commercial business in a residential district **that may be conducted in another locality** (emphasis added) with equal profit and advantage, and an ordinance that wholly deprives the owner of land of its valuable mineral content" and referring to Hadacheck v. Los Angeles, **supra,** and Reinman v. Little Rock 237 U. S. 171 as to a livery stable which "could be conducted elsewhere."

Other cases which combine this principle with the principles of the cases on tests of reasonableness for a Zoning Ordinance discussed above include:

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Standard Oil Co. v. City of Bowling Green
50 S. W. (2nd) 960 (Ct. App. Ky., 1932)
where the court relies on the Hadacheck case and also the Nectow, Cleveland Jewish Orphans Home, Women's Kansas City St. Andrew Society, and numerous other cases, as to operation of a gasoline station in a residential district.

Also in point are:

Del Fanta v. Sherman (Los Angeles)
107 Cal. App. 746, 290 Pac. 1087 (1930)

Pacific Palisades Assn. v. City of Huntington Beach, Calif.
196 Cal. 211, 237 Pac. 538 (1925)

Oklahoma City, v. Dolese
48 F. (2) 734 (C. C. A. 10th, 1931)

Because of acquisition of a **vested right** by Full Salvation Union, the injunction, on this ground alone, should be dissolved.

Point Five

The injunction against temporary dwellings in connection with the Camp Meeting use is invalid, since they are necessarily incident to such use.

Having established the Camp Meeting use as a lawful use on the 15 acre tract of woods, the injunction against "erecting, maintaining or using or suffering or permitting the use thereof of any tents, cabins, and/or other structures for camping and/or temporary dwelling purposes," is invalid since without such temporary habitations it is impossible to carry on the use.

No reason is shown for the ban. Insistence that the

temporary dwellings comply with all requirements for permanent year-round homes is refusal to recognize the Camp Meeting use. Compliance with all state health requirements was shown (Record 25-34, 325-7). The tents, cabins and cottages are "accessory buildings" to the tabernacle (Record 203, 247) and were expressly so recognized by the trial court (Record 134) and by the Township attorney (Record 237) and the Township Board agreed to recognize them as such at their meeting on Dec. 22, 1943 (Record 304-305, 305). The ordinance expressly authorizes accessory buildings in Sec. 1 and Sec. 4-10.

Where a Zoning Ordinance permitted the carrying on of a general contracting business a general contractor was held entitled to store on his premises, machinery, tools and accessories regularly used in the conduct of his business.

Greenfield v. Board of City Planning (Los Angeles)
6 Calif. App. (2nd) 515, 45 P. (2nd) 219

Consequently, the Camp Meeting use being valid, use of temporary dwellings is also valid and the injunction against temporary dwellings should be dissolved.

Point Six

The Township as a plaintiff seeking an injunction, **failed to sustain the burden of proof.**

The plantiff in a suit for injunction has the burden of proof. Jones on Evidence, 4th ed. vol. 1, p. 368, citing among others:

Champlin Ref. Co. v. Corporation Commission
286 U. S. 210

U. S. v. American Livestock Com. Co.
279 U. S. 435

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As held by the Michigan Supreme Court, the Township's case is supported by the presumption that the zoning ordinance is valid and by the statutory declaration of nuisance as to noncomplying uses and buildings, yet these only help the plaintiff to make out a **prima facie** case and they are subject to a showing of facts: that the ordinance is arbitrary and unreasonable and that the statutory declaration of nuisance is not supported by the facts.

By the evidence discussed under the foregoing five points, appellants completely overcame both the presumption and the statutory declaration as demonstrated by the numerous cases cited in which ordinances were held invalid as arbitrary and unreasonable under Amendment XIV of the U. S. Constitution. Thereupon, the burden of proceeding with the evidence shifted to the Township which failed altogether to negate the facts produced by appellants or to produce new facts showing a right to an injunction and thereby the Township failed to sustain the burden of proof necessary to establish its right to an injunction.

It has been so held in a case closely in point.

Simms v. City of Sherman (Tex.)
181 S. W. (2nd) 100 (Civ. App. Tex., 1944)

The facts show that appellants have a right to an injunction against the Township and its Board.

Hume v. Laurel Hill Cemetery
142 F. 552 (C. C N. D. Calif., 1905)

Since the injunction denies to appellants a religious use of the 15 acre tract of woods, and since the injunction is invalid because of the reasons hereinabove discussed, appellants' rights to religious freedom are

being abridged contrary to Amendment I and XIV of the U. S. Constitution, and the injunction should be dissolved.

B. AS TO THE CHURCH

As to the partially constructed church building, the legal problems are somewhat different from those as to the Camp Meeting.

Sec. 4 of the ordinance expressly authorizes the construction of churches in the B-Residence district where this church is located.

No question whatever was raised as to compliance of the church building with the building regulations of the ordinance.

The injunction requires summary removal of the partially constructed church building.

The only basis for the injunction is that a permit had not been issued for its construction.

On this point the argument of appellants is:

I That the injunction is invalid because a **permit was granted** and the church has a vested property right.

II That if it be held a permit was not granted then the **refusal to issue a permit was arbitrary and unreasonable** and does not support the mandadatory injunction.

III That a mandatory injunction for **demolition requires evidence of nuisance** such as, that the building does not comply with some building requirement of the ordinance or that for some reason it should not be allowed to stand.

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I. A Permit was Granted.

Although the trial court found that a permit had not been granted (Record 319) yet there is no substantial evidence to support that finding and it is clearly erroneous.

Application for the permit was made by J. F. Andrews for Full Salvation Union on May 16, 1944, to the Fire Chief (Record 242-3, 305) who had authority to issue permits. The permit was fully made out (Record 79-80, Exh. D.) and the proper fee was paid and receipt given (Record 89, 243, 306) but delivery was delayed (Record 89) until the Board meeting on May 22, 1944, at which as recorded in the Clerk's minutes:

"A motion was made and supported to table the building permit of the new church of the Salvation Union until their garage building is completed. Motion carried" (Record 318) and two members of the Board at the meeting interpreted the Board's action with the statement, "Now Reverend Andrews won't be expected to come back here to get a permit when they get the garage built." (Record 296).

Based on the action taken and the Board's discussion J. F. Andrews testified (Record 295-6):

Q. Well, you didn't have a permit for that church building did you?

A. Well, I considered that I did.

Q. You didn't—you knew that it was refused to you?

A. The understanding I had was that as soon as we got the garage built we could go ahead with the church.

Q. Now when you started this church building, had you completed the garage?

A. Yes, I think we had. I explain it to him (Fire

Chief on phone) I says, "We have complied with your request. We worked two days on the garage and we got it all completed except we haven't got the cement floor in." —We thought we would put that in later— "and it isn't painted, and we have got people coming that will do the painting."

From this evidence—application for and making out of permit, payment of fee and the action taken by the Board—it is clear, that a permit was granted, although a formal permit was not delivered. Consequently upon construction of the church building Full Salvation Union acquired a **vested property right** that cannot be taken away by the injunction. Failure to deliver a formal permit cannot prejudice the right of Full Salvation Union to its church property.

Dobbins v. Los Angeles
195 U. S. 223 (1904)

Herskovits v. Irwin
299 Penn 155, 149 A. 195 (1930)

and other cases cited on vested right under Point Four.

However, if it be found that a permit was not granted, yet the arbitrary refusal by the Board to issue a permit will not support the injunction.

II. Refusal to Issue Permit Was Arbitrary and Unreasonable

Construing the action of the Board as not granting a permit, as found by the trial Court (Record 319), then the Board's refusal to issue a permit was arbitrary and unreasonable and will not support the mandatory injunction for demolition.

The application for the permit on May 16, 1944, and payment of the proper fee are admitted (Record 89,

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243). The basis for denial of the permit as recorded in Clerk's minutes of Board Meeting May 22, 1944 (Record 318) was "to table the building permit of the new church of the Salvation Union until their garage building is completed." This is obviously an irrelevant reason and being a refusal of a permit was on its face arbitrary and unreasonble.

This was a repetition of a tactic previously employed when the garage was delayed from Nov. 26, 1943, until the accessory buildings should be converted into year round homes—a position later modified by authorizing permits for the accessory buildings and the garage on Dec. 22, 1944 (Record 242, 305) but then again reversed by refusing permits for the accessory buildings and authorizing the injunction suit April 5, 1944, which was started in June, 1944 (Record 10, 65, 78).

These vaccillating and delaying tactics of the Board over a period of eight months when considered in the light of other events hereinafter discussed under **"Motivation of the Suit"** seem explainable only as a course calculated to discourage appellants from development of the Camp Meeting grounds including construction of the church building, and when it was found this course would not succeed, the suit was started.

Such arbitrary and unreasonable exercise of power will not support the injunction.

Yick Wo. v. Hopkins
118 U. S. 356 (1886)

City of W. Uni. Place v. Ellis
134 Tex. 222, 134 S. W. (2nd) 1038 (1940)

Village of N. Hornell v. Rauber
181 Misc. 546, 555, 40 N. Y. S. (2nd) 938, 946 (1943), citing Village of Mill Neck v. Nolan

233 App. Div. 248, Aff'd. mem. op. 259 N. Y. 596 (1932)

III. Mandatory Injunction for Demolition Requires Evidence of Nuisance

To support a mandatory injunction for demolition the evidence must show that the building does not comply with some building requirement of the ordinance or that for some reason it should not be allowed to stand.

The only basis for issuing the injunction is that a permit had not been issued. The injunction decree reads, "all structures heretofore erected on said premises without building permits or certificates of compliance as required by the provisions of the said Portage Township zoning ordinance, are hereby declared by this Court to be nuisances per se, and defendants shall forthwith remove all such structures within thirty days."

This is not a basis for a mandatory injunction for demolition. The rule as to the required basis for demolition is clearly expressed by the Supreme Court of Porto Rico, which upon an appeal from a judgment dismissing an application for demolition of a structure erected without a permit, stated: "the mere infringement of the same (ordinance) does not justify the demolition of the structure . . . it was not sufficient for the municipality to prove that the appellee had erected a new two-story building without complying with the requirements of the said ordinance, but it should have proved besides that the structure erected . . . was not one that could have been authorized or that it is of such a character that it should not be allowed to stand. The evidence introduced at the trial did not cover these points, and, therefore . . . the

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judgment dismissing the complaint must be affirmed."

Municipality of Ponce v. Solis
25 Porto Rico 117 (1917)

Municipality of Ponce v. Gely
25 Porto Rico 140 (1917)

That this is the rule under Amendment XIV of the U. S. Constitution there could seem to be no doubt, especially when application was made for a permit and the building was erected in good faith.

In all cases where a mandatory injunction for demolition has been granted, there has been a showing that the building violates some building regulation or that the building is a nuisance in fact. Upon extensive research no case has been found where a mandatory injunction for demolition was issued without such evidence. Not to require evidence that the building fails to comply with some building requirement of the ordinance or that for some reason it should not be allowed to stand, is to recognize legislative declaration of nuisance as sufficient for demolition which is contrary to well established legal principles.

Yates v. City of Milwaukee
77 U. S. (10 Wall.) 497 (1870)

Crossman v. City of Galveston
247 S. W. 810, 813 (Sup. Ct. Tex., 1923), 26 A. L. R. 1210

The burden of proof was on the Township to show a right to an injunction.

Selectmen of Sudbury v. Garden City Gravel Corp.
300 Mass. 41, 14 N. E. (2nd) 112 (1938)

Crossman v. City of Galveston
247 S. W. 810, 815 (Sup. Ct. Tex., 1923)

Simms v. City of Sherman
181 S. W (2nd) 100 (Civ. App. Tex., 1944)

Not one word of evidence was introduced to show that the church building did not comply with the building requirements of the ordinance or that for any reason it should not be allowed to stand.

August 25, 1944, the Township appointed George Adams as inspector to report violations of the building requirements of the ordinance (Record 86, 118-119) but at the trial December 26-28, 1944, this inspector was not put on the stand nor did anyone else testify that the building violated any building requirement of the ordinance or that it was a nuisance in fact in any respect.

A mandatory injunction for removal of the building which does not rest on any evidence to support it is itself arbitrary and unreasonable and deprives Full Salvation Union of property without due process of law.

DENIAL OF RIGHT TO RELIGIOUS FREEDOM

Appellants being deprived of the right to build a church and hold religious services therein by an injunction which is invalid are as a result suffering an abridgement in religious freedom guaranteed by Amendments I and XIV of the U. S. Constitution.

Consequently the injunction preventing completion of the church building and requiring its summary removal, in absence of any showing of noncompliance of the building with requirements of the ordinance or of its being a nuisance in fact, is contrary to Amendments I and XIV of the U. S. Constitution and should be dissolved.

However, if the Court is disinclined to dissolve the

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injunction completely then the injunction should be limited to prohibition of continuance of construction until Full Salvation Union, appellant herein, shall again apply for a permit in accordance with the provisions of the ordinance. In this way appellants can be protected from the arbitrary and unreasonable refusal of the Board to issue a permit for construction of the church.

C. MOTIVATION OF THE SUIT

The motivation of the injunction suit is not a zeal for enforcement of the zoning ordinance but (a) prejudice against the religious views and practices of appellants and (b) fear by the Township Board that poor families might occupy the accessory buildings as year round dwellings.

That prejudice motivated this suit, to enjoin appellants from conducting the camp meeting use and from constructing a church in Portage Township, is clearly shown by the references of the attorney for the Township in cross examination of J. F. Andrews (Record 305-307) as to his sermon on "Crucifying Jesus" which he preached over the radio station WKZO in Kalamazoo and sometime thereafter had published on June 15, 1944 in the church paper, "Union Guide," (Township's Exhibit C) copies of which were sent to the Board members (Record 306). To this event the attorney attributes the change in the attitude of the Board between Dec. 12, 1943, when the cabins and cottages were recognized by the Board as accessory buildings and permits were authorized for them, and April 5, 1944, when the Board decided to institute the injunction suit against appellants.

In this Exhibit introduced in evidence by the Township (Record 308, 306, 49) is a clear statement showing the

nature of the prejudice as shown by the conduct of the Board at one of its meetings.

". . . The first matter presented for consideration was a request by three gentlemen for permission to reopen an amusement place of such a character it was stated that those who enter must present evidence to show that they are twenty-one years of age or over, where dancing and drinking and the Lord only knows what else is the order of the program sponsored on and on into the night. A promise was made and accepted at face value about harmonizing with the law concerning the sale of intoxicating beverage to minors, and the admission was made by one member of the board that there was no way for any such place to keep from breaking the law in this regard. It took the Portage Township board less than three minutes to fully agree and nothing was said about the manner in which the band should play or the amount of noise the dancers should be permitted to make.

"The next matter presented was a request by my father, Rev. E. A. Andrews of Battle Creek, the General Pastor of the Full Salvation Union, a religious home missionary enterprise, legally incorporated and protected under the laws of the State of Michigan. His letter addressed to the Portage Township Board, Portage Center, Michigan was read:

"Dear Sirs:

"Having been informed that we are supposed to get building permits for all construction in your township, I hereby make application to build a small accessory building on our campground to be used as a guest chamber. The building will be used a little less than two weeks out of each year to house some minister or other

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distinguished guest during our annual Camp Meeting. The foundation is to be cement and it is to be covered with siding and paint. The size is to be ten feet wide by twelve feet long. These dimensions are adequate for our purpose, because this building is to be used only as a sleeping room or for rest during the day. It will be similar to the better cabins often seen in our tourist camps.

Very respectfully submitted,

E. A. Andrews.

"Following this simple and reasonable request for nearly two hours the Full Salvation Union was criticized. The services held for two weeks each year were too noisy. Those who attended were found fault with because they said "praise the Lord," in the store while buying groceries. One was heard to mutter during the storm that it was not only the buildings but this danged noise while another asserted his only concern in it all was for the ordinance, reminding one of Pilate who attempted to wash his hands of responsibility when he delivered Christ to be crucified. Again and again it was asserted Monday night that the ordinance voted in by the people must bear all the responsibility for this night's doings.

"To counteract this attitude the following, copied from Act 302 of Mich. Public Acts of 1937, the act under which the ordinance was enacted was read. "Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, the board of appeals (the Township Board in this instance) shall have power in passing upon appeals to interpret any of its rules, regulations or provisions relating to the construction, structural changes in, equipment or alteration of buildings, or

structures so that the spirit of the ordinance shall be observed, public safety secured and substantial justice done." Here the very law under which the ordinance was enacted throws the responsibility right back on the hands of the board not to always insist on the observance of the strict letter of the ordinance but rather to interpret it in an elastic and reasonable way so that the spirit of the ordinance shall be observed, public safety secured and substantial justice done.

"I do not remember how this responsibility was sidestepped but my father's request was discarded without a vote and thus the Full Salvation Union was refused the privilege of building out under the trees in a secluded spot on their twenty acre camp ground a guest room for the man of God when he comes. It sounds unbelievable. It is so unreasonable it stops expression. Dancing and drinking released in less than three minutes with the admission that the law is sure to be broken but the simple and reasonable request of a man of God who for over forty years has poured out his life for the betterment of society in service to his Lord denied in a two hour storm of words. It is true that God alone knows the reason for this; and if the Portage Township Board has crucified the Son of God afresh and put him to an open shame; but one cannot help when faced with such shameful action, voice the wondering question, Has it happened again?

"Has Barabbas been released, and Christ crucified?

" 'Father forgive them for they know not what they do.' "

This prejudice was also manifested in questions by the attorney for the Township as to the opinions of J. F. Andrews as to the "other churches in Portage Township" and as to whether he

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had said "all the other churches in Portage Township were dead churches" (Record 307) and by the unconscionable inquisition into the history and private finances of Marion Andrews and J. F. Andrews which had no bearing whatever on the alleged zoning ordinance violation (Record 156-7, 208-213, 311-315).

Furthermore with all due respect to the trial judge, yet it must be noted that this prejudice was clearly manifested by the trial judge himself who time after time tried to elicit testimony showing that the church building was not a church building (Record 84-5, 134, 144-5, 150, 297) even going so far as to criticize questions by the attorney for the Township because they referred to the building as a church (Record 297) but this attorney had personally visited the grounds and had seen the building (Record 296) and did not question but that the building was a church as the witnesses testified (Record 154, 316). This effort of the trial judge was abandoned, however, after witnesses for appellants testified as to the character of the building and at no time was it even asserted that the building did not comply with the ordinance or that it was a nuisance in fact.

The trial judge also indulged in argument with a witness for appellants as to **who,** he naming several persons, lived in the vicinity of West Lake (Record 185-6) from which the camp ground is about one-quarter mile distant.

The prejudice of the trial judge was also manifested by his defamatory and libelous opinion attacking the characters of M. E. Andrews and J. F. Andrews for which there was no basis whatever inside or outside the Record and is only explainable as an effort to compensate for lack of evidence that would support the sweeping and cruel injunction that he desired to give.

Besides the prejudice, another factor motivating this suit was the fear that poor families might be allowed to occupy the accessory buildings as residences. The Supervisor who is chairman of the Township Board testified: "that was what the Town Board was disturbed about, because they thought in depression times they might a lot of them be occupied." (Record 126-7).

Speculation as to the right to an injunction if such an eventuality should ever occur is unnecessary. No such condition existed or was threatened. Whatever the misapprehension of the Board may have been, it was not the basis of the injunction issued since the injunction is not designed to meet any such problem. Instead the injunction is calculated to drive appellants completely out of Portage Township as to any camp meeting use or any church services.

While such prejudice and misapprehension have no direct bearing on the validity of the ordinance yet they are factors which the Court can consider in relation to the testimony of witnesses and the validity of the injunction.

2700 Irving Park Bldg. Corp. v. City of Chicago
395 Ill. 138, 69 N. E. (2nd) 827 (1946).

CONCLUSION

Therefore—

Because the blanket exclusion of a Camp Meeting use from the 36 square miles of Portage Township is arbitrary and unreasonable;

Because the exclusion from the B-Residence district in Portage Township of a Camp Meeting use is arbitrary and unreasonable in relation to the character of

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the restricted area as shown by other uses therein permitted and conducted;

Because the exclusion from the 15 acre tract of woods of the Camp Meeting use is arbitrary and unreasonable in relation to the immediately surrounding property since such use is the "best use" of the 15 acre tract of woods;

Because Full Salvation Union had acquired a vested property right to use the 15 acre tract of woods for Camp Meeting purposes;

Because the temporary dwellings are necessarily incident to the Camp Meeting use as a lawful use;

Because Portage Township as plaintiff seeking an injunction failed to sustain the burden of proof necessary to show any right to an injunction against the Camp Meeting use;

Because the mandatory injunction for summary removal of the partially constructed church building is invalid: since either a permit was issued for its construction and the church has a vested right or the refusal of the permit was arbitrary and unreasonable; and since the church building is not shown to violate any building requirement of the ordinance or to be a nuisance in fact; and

Because this injunction suit is motivated by prejudice and not by a desire to enforce the zoning ordinance;

Appellants respectfully urge that the injunction deprives appellants of religious and property rights protected by Amendments I and XIV of the U. S. Con-

stitution and that such denial and deprivation of Constitutional rights involves substantial federal questions, and these rights of appellants will be protected only by a review of this case by this Court.

Respectfully,
Burton Andrews
Counsel for Appellants

CERTIFICATE

This is to CERTIFY that this Petition for Rehearing is presented in good faith and not for delay.

Burton Andrews
Counsel for Appellants

No. 609. FULL SALVATION UNION ET AL. *v.* PORTAGE TOWNSHIP. Appeal from the Supreme Court of Michigan. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. MR. JUSTICE MURPHY is of the opinion that probable jurisdiction should be noted. MR. JUSTICE RUTLEDGE is of the opinion that the question of jurisdiction should be postponed to a hearing of the case on the merits. *Burton Allen Andrews* for appellants. *Lewis George Meader* and *Harry F. Smith* for appellee. Reported below: 318 Mich. 693, 29 N. W. 2d 297.